

## **11. Appendix A — RCS Phase II Contract Terms and Conditions**



Contract Number *[XXX-XXX-XXX]*

for

*A Turnkey Revenue Collection System*

between the

*Washington State Department of  
Transportation*

and

*[Vendor]*

Effective Date: \_\_\_\_\_

*[Add date when signed by all parties]*

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**CONTRACT NUMBER [XXX-XXX-XXX]**

for

**A Turnkey Revenue Collection System****PARTIES**

This Contract (“Contract”) is entered into by and between the state of Washington, acting by and through WSDOT/WSF, an agency of Washington State government (Purchaser located at 809 Legion Way SE, Olympia, WA. 98501 [Purchaser address], and [Vendor], a [corporation/sole proprietor or other business form] licensed to conduct business in the state of Washington (“Vendor”), located at [Vendor address] for the purpose of purchasing Hardware products and Software licenses for WSDOT/WSF’s Revenue Collection System.

**RECITALS**

The state of Washington, acting by and through WSDOT/WSF, issued a Request for Proposal (RFP) dated [date], (Exhibit A) for the purpose of purchasing a turnkey Revenue Collection System (RCS) in accordance with its authority under chapter 43.105 RCW. While RCS is initially envisioned as being central to WSF's daily operations, WSDOT intends that the benefits of this procurement also be available to other WSDOT divisions on a statewide basis in the event that other WSDOT projects requiring collection of fares and tolls are built.

[Vendor] submitted a timely Response to WSDOT/WSF’s RFP (Exhibit B).

WSDOT/WSF evaluated all properly submitted Responses to the above-referenced RFP and has identified [Vendor] as the apparently successful Vendor.

WSDOT/WSF has determined that entering into a Contract with [Vendor] will meet Purchaser’s needs and will be in Purchaser’s best interest.

NOW THEREFORE, Purchaser awards to [Vendor] this Contract for the design, development and implementation of the RCS the terms and conditions of which shall govern Vendor’s furnishing to WSDOT/WSF the RCS. This Contract is not for personal use.

IN CONSIDERATION of the mutual promises as hereinafter set forth, the parties agree as follows:

**1. Definition of Terms**

The following terms as used throughout this Contract shall have the meanings set forth below.

**“Acceptance”** shall mean a written notice from Purchaser to Vendor that the System has passed its Acceptance Testing or, if there is no Acceptance Testing, Acceptance shall occur when the Products are delivered.

**“Acceptance Date”** shall mean the date upon which Purchaser Accepts the Software as provided in the section titled **Standard of Performance and Acceptance**.

**“Acceptance Testing”** shall mean the process for ascertaining that the Software meets the standards set forth in the section titled **Standard of Performance and Acceptance**, prior to Acceptance by the Purchaser.

**“Business Days and Hours”** shall mean Monday through Friday, 8:00 a.m. to 5:00 p.m., Pacific Time, except for holidays observed by the state of Washington.

**“Confidential Information”** shall mean information that is exempt from disclosure to the public or other unauthorized persons under either chapter 42.17 RCW or other state or federal statutes. Confidential Information may include, but is not limited to, names, addresses, Social Security numbers, e-mail addresses, telephone numbers, financial profiles, credit and debit card information, driver’s license numbers, medical data, law enforcement records, agency source code or object code, agency security data, or any related payroll/labor data.

**“Contract”** shall mean this document, all schedules and exhibits, and all amendments hereto.

**“Deliverable”** shall mean milestone, individual item or work from a product or component part.

**“Delivery Date”** shall mean the date by which the Products ordered hereunder must be delivered.

**“Effective Date”** shall mean the first date this Contract is in full force and effect. It may be a specific date agreed to by the parties; or, if not so specified, the date of the last signature of a party to this Contract.

**“Effectiveness Level”** shall mean the percentage of time in a month that a Product is functioning properly in accordance with its Specifications.

**“Exhibit A”** shall mean the *ACQ-2002-0703-RFP*.

**“Exhibit C”** shall mean *[Vendor]*’s Response.

**“Firmware”** shall mean firmware is programming that is inserted into programmable read-only memory (programmable read only memory, ROM), thus becoming a permanent part of the computing device.

**“Hardware”** shall mean the physical aspect of computers, telecommunications, and other information technology devices. Hardware is a collective term that includes not only the computer proper, but also the cables, connectors, power supply units, and peripheral devices such as keyboard, mouse, audio speakers, display screens, bar code scanners, smart card/transponder readers, printers, displays, receipt and document printers, self service kiosks, and network routers. Hardware is also used collectively to describe the physical aspects of telephony and telecommunications network infrastructure. **“Help Desk”** shall mean a service provided by Vendor for the support of Vendor’s Products. Purchaser shall report warranty or maintenance problems to Vendor’s Help Desk for initial troubleshooting and possible resolution of the problems or for the initiation of repair or replacement services.

**“Installation Date”** shall mean the date by which all Hardware and Software ordered hereunder shall be in place, in good working order *and* ready for Acceptance Testing. The Installation Date shall be established and approved by WSDOT after the Vendor has prepared a detailed project schedule.

**“License”** shall mean the rights granted to Purchaser to use the Software that is the subject of this Contract.

**“Order”** or **“Order Document”** shall mean any official document and attachments thereto specifying the Software and/or Services to be licensed or purchased from Vendor under this Contract.

**“Political Subdivision”** Any unit of local government within the states of Washington and/or Oregon that receives state funds (e.g., cities, counties, school districts, special purpose districts



local service districts) is a member of the states' purchasing co-op, and is authorized to purchase from state contracts by inter-local agreements. For the State of Oregon, the term "political subdivision" includes nonprofit corporations and institutions of higher education (e.g., colleges, universities, community and technical colleges)

**"Price"** shall mean charges, costs, rates, and/or fees charged for the Products and Services under this Contract or, as the context requires, for similar products and services that vendor provides under other contracts, and shall be paid in United States dollars.

**"Product(s)"** shall mean any Vendor-supplied Hardware, Software, and documentation.

**"Proprietary Information"** shall mean information owned by Vendor to which Vendor claims a protectable interest under law. Proprietary Information includes, but is not limited to, information protected by copyright, patent, trademark, or trade secret laws.

**"Purchaser"** Unless otherwise restricted by the RFP, includes all members of the State of Washington, State Purchasing Cooperative and/or the State of Oregon Cooperative Purchasing Program including where applicable: State agencies, political subdivisions of Washington or Oregon, qualified non-profit corporations, institutions of higher education (e.g., colleges, universities, community & technical colleges) who choose not to purchase independently under RCW 23.B.10.029.

**"Purchaser Project Manager"** shall mean the person designated by Purchaser who is assigned as the primary contact person whom Vendor's Account Manager shall work with for the duration of this Contract and as further defined in the section titled **Purchaser Project Manager**.

**"Purchaser Contract Administrator"** shall mean that person designated by Purchaser to administer this Contract on behalf of Purchaser.

**"Purchaser Contracting Officer"** shall mean Chief Information Officer, or the person to whom signature authority has been delegated in writing. This term includes, except as otherwise provided in this Contract, an authorized representative of the Purchaser Contracting Officer acting within the limits of his/her authority.

**"RCS"** shall mean the Revenue Collection System, including all Hardware products, software and Network Hardware and Software.

**"RCW"** shall mean the Revised Code of Washington.

**"RFP"** shall mean the Request for Proposal used as a solicitation document to establish this Contract, including all its amendments and modifications, Exhibit A hereto.

**"Response"** shall mean Vendor's Response to Purchaser's RFP for the Design, Development and Implementation of a new Revenue Collection System, Schedule A hereto.

**"Schedule A: Authorized Product and Price List"** shall mean the attachment to this Contract that identifies the authorized Hardware, Software and Services and Prices available under this Contract.

**"Schedule C: Escrow Agreement"** shall mean the attachment to this Contract containing the Software Escrow Agreement entered into by Purchaser and Vendor.

**"Services"** shall mean those services provided under this Contract and related to the Hardware products and Software License(s) being purchased that are appropriate to the scope of this Contract and includes such things as installation services, maintenance, training, etc.

**“Software”** shall mean software is instructions for computers that users runs or executes. A series of instructions that perform a particular task is called a program. There are two major categories of software: (1) “System Software” and (2) “Application Software”. System software is a set of control programs such as the operating system, database management system (DBMS), and all the utilities that enable the computer to function. Application software is any program that processes data for the user (inventory, payroll, spreadsheet, word processor, etc.).

**“Specifications”** shall mean the technical and other specifications set forth in the RFP, Exhibit A, any additional specifications set forth in Vendor’s Response, Exhibit B, and the specifications set forth in Vendor’s Product documentation, whether or not Vendor produces such documentation before or after this Contract’s Effective Date.

**“Standard of Performance”** shall mean the criteria that must be met before Acceptance, as set forth in the section titled **Standard of Performance and Acceptance**. The Standard of Performance also applies to all additional, replacement or substitute Hardware, and Software that is modified by or with the written approval of Vendor after having been accepted.

**“System”** shall mean the Vendor’s object code version of computer programs and any related documentation, excluding maintenance diagnosis. System also means the source code version, where provided by the Vendor and any Products, training, and Work Products used in the Revenue Collection System (RCS).

**“Subcontractor”** shall mean one not in the employment of Vendor, who is performing all or part of the business activities under this Contract under a separate contract with Vendor. The term “Subcontractor” means Subcontractor(s) of any tier.

**“Vendor”** shall mean, as the context requires, *[Vendor]*, its employees and agents; any firm, provider, organization, individual, or other entity performing the business activities under this Contract; and any Subcontractor retained by Vendor as permitted under the terms of this Contract.

**“Vendor Account Manager”** shall mean a representative of Vendor who is assigned as the primary contact person whom the Purchaser Project Manager shall work with for the duration of this Contract and as further defined in the section titled **Vendor Account Manager**.

**“Vendor Contracting Officer”** shall mean *[title of Vendor officer with signature authority]*, or the person to whom signature authority has been delegated in writing. This term includes, except as otherwise provided in this Contract, an authorized representative of Vendor Contracting Officer acting within the limits of his/her authority.

**“Warranty Period”** shall mean the period of time as set forth in the section titled **Hardware and Software Warranty** wherein Vendor warrants that the Hardware and Software shall be in good operating condition and shall conform to the Specifications.

**“Work Product”** shall mean data and products produced under this Contract including but not limited to, discoveries, formulae, ideas, improvements, inventions, methods, models, processes, techniques, findings, conclusions, recommendations, reports, designs, plans, diagrams, drawings, Software, databases, documents, pamphlets, advertisements, books, magazines, surveys, studies, computer programs, films, tapes, and/or sound reproductions, to the extent provided by law.

## Contract Term

### 2. Term

#### 2.1. Term of Contract for Licensed Software Purchases

All executed purchase orders pursuant to this Contract's authority shall be placed by *[date]* and Vendor shall have the Software delivered by the date specified in the **Delivery** section and installed by the date specified in the **Installation** section.

#### 2.2. License Term—see Section 10, **Software License**

#### 2.3. HARDWARE Purchase

All purchase transactions executed pursuant to this Contract's authority shall be placed by *[date]* and Vendor shall have the Hardware delivered by the date specified in the **Delivery** section and installed by the date specified in the **Installation** section.

#### 2.4. This Contract's Hardware purchase term shall be automatically extended for up to ten (10) additional one year terms unless Purchaser terminates by giving written notice of its decision not to extend to Vendor not less than thirty (30) calendar days prior to the then-current Contract term's expiration. This Contract's terms and conditions shall govern each maintenance term. No change in terms and conditions shall be permitted during these extensions unless specifically agreed to in writing.

#### 2.5. Software Maintenance and Support

a) This Contract's initial Software maintenance and support term shall be ten (10) year(s), commencing the day following expiration of Vendor's warranty for the Software.

#### 2.6. This Contract's Software maintenance and support term may be extended by up to ten (10) additional one (1) year, terms: provided that the extensions shall be at Purchaser's option and shall be effected by Purchaser giving written notice of its intent to extend this Contract to Vendor not less than thirty (30) calendar days, prior to the then-current Contract term's expiration and Vendor accepting such extension prior to the then-current Contract term's expiration. This Contract's terms and conditions shall govern each maintenance term. No change in terms and conditions shall be permitted during these extensions unless specifically agreed to in writing.

#### 2.7. Hardware Maintenance

a) This Contract's initial Hardware maintenance term shall be three (3) years, commencing the day following expiration of the Hardware's warranty.

#### 2.8. This Contract's Hardware maintenance term may be extended by up to seven (7) additional one (1) year term, provided that the extensions shall be at Purchaser's option and shall be effected by Purchaser giving written notice of its intent to extend this Contract to Vendor not less than thirty (30) calendar days prior to the then-current Contract term's expiration and Vendor accepting such extension prior to the then-current Contract term's expiration. This Contract's terms and conditions shall govern each maintenance term. No change in terms and conditions shall be permitted during these extensions unless specifically agreed to in writing.

### 3. Survivorship

All license and purchase transactions executed pursuant to the authority of this Contract shall be bound by all of the terms, conditions, Prices and Price discounts set forth herein, notwithstanding the expiration of the initial term of this Contract or any extension thereof. Further, the terms, conditions and warranties contained in this Contract that by their sense and context are intended to survive the completion of the performance, cancellation or termination of this Contract shall so survive. In addition, the terms of the sections titled **Overpayments to Vendor; License Grant; Software Ownership; Software Code Escrow; Ownership/Rights in Data; Data Warranty; No Surreptitious Codes Warranty; Vendor Commitments, Warranties and Representations; Protection of Purchaser's Confidential Information; Section Headings; Incorporated Documents and Order of Precedence; Publicity; Review of Vendor's Records; Patent and Copyright Indemnification; Vendor's Proprietary Information; Disputes; and Limitation of Liability**, shall survive the termination of this Contract.

## Pricing, Invoice, Payment and Performance Bond

### 4. Pricing

- 4.1. The total amount expended under this Contract shall not exceed [ ] dollars [\$ ]. Payments made by WSDOT/WSF the Contractor are full compensation for all labor, Hardware, materials, supplies, travel and per diem and incidentals necessary to complete the Statement of Work for this contract.  
  
Any milestone required as a part of the terms and conditions of this Contract is considered a Deliverable. Fifteen percent (15%) of the value of each identified milestone will be withheld pending completion of the Contract. Following acceptance of all said Deliverables, the WSDOT/WSF Project Manager shall direct release of said fifteen percent (15%) at signing of final RCS Acceptance.
- 4.2. Vendor agrees to provide the Products and Services at the Prices set forth *in Vendors' Proposal date and Schedule A*. No other Prices shall be payable to Vendor for implementation of Vendor's Response.
- 4.3. Upon expiration of Vendor-provided warranty as set forth in the sections titled **Software Warranty and Hardware Warranty** and upon election by Purchaser to receive maintenance and support Services from Vendor, Purchaser shall pay maintenance and support fees to Vendor calculated at five percent (5%) of Vendor's then-current license fee for the Software Product.
- 4.4. Prices shall not be increased during the initial term of the Contract.
- 4.5. If Vendor reduces its Prices for any of the Hardware, Software or Services during the term of this Contract, Purchaser shall have the immediate benefit of such lower Prices for new purchases. Vendor shall send notice to the Purchaser Contract Administrator within fifteen (15) Business Days of the reduction taking effect. Vendor shall send updated Prices to the the Purchaser quarterly.
- 4.6. Vendor agrees all the Prices, terms, warranties, and benefits provided in this Contract are comparable to or better than the terms presently being offered by Vendor to any other governmental entity purchasing the same quantity under similar terms. If during the term of this Contract, Vendor shall enter into contracts with any other governmental entity

providing greater benefits or more favorable terms than those provided by this Contract, Vendor shall be obligated to provide the same to Purchaser for subsequent purchases.

## **5. Advance Payment Prohibited**

No advance payment shall be made for the Hardware, Software and Services furnished by Vendor pursuant to this Contract. Notwithstanding the above, maintenance payments, if any, may be made on a quarterly basis at the beginning of each quarter.

## **6. Taxes**

- 6.1. Purchaser will pay sales and use taxes, if any, imposed on the Products and Services acquired hereunder. Vendor must pay all other taxes including, but not limited to, Washington Business and Occupation Tax, other taxes based on Vendor's income or gross receipts, or personal property taxes levied or assessed on Vendor's personal property. Purchaser, as an agency of Washington State government, is exempt from property tax.
- 6.2. Vendor shall complete registration with the Washington State Department of Revenue and be responsible for payment of all taxes due on payments made under this Contract.

## **7. Invoice and Payment**

- 7.1. Vendor will submit properly itemized invoices to Purchaser's Project Manager at 2911 Second Avenue, Seattle, Washington. Invoices shall provide and itemize, as applicable:
  - a) Purchaser Contract number *[XXX-XXX-XXX]*;
  - b) Vendor name, address, phone number, and Federal Tax Identification Number;
  - c) Description of Software, Hardware Products and Services including quantity ordered;
  - d) Date(s) of delivery and/or date(s) of installation and set up;
  - e) Price for each item, or Vendor's list Price for each item and applicable discounts;
  - f) Maintenance charges;
  - g) Net invoice Price for each item;
  - h) Deliverables
  - i) Applicable taxes;
  - j) Shipping costs;
  - k) Other applicable charges;
  - l) Total invoice Price; and
  - m) Payment terms including any available prompt payment discount.

- 7.2. Subject to Section 4.1 payments shall be due and payable within thirty (30) calendar days after receipt and Acceptance of Software, Hardware Products or Services or thirty (30) calendar days after receipt of properly prepared invoices, whichever is later.
- 7.3. Incorrect or incomplete invoices will be returned by Purchaser to Vendor for correction and reissue.
- 7.4. The Purchaser Contract number *[XXX-XXX-XXX]* must appear on all invoices, bills of lading, packages, and correspondence relating to this Contract.
- 7.5. Purchaser shall not honor drafts, nor accept goods on a sight draft basis.
- 7.6. If Purchaser fails to make timely payment, Vendor may invoice Purchaser one percent (1%) per month on the amount overdue or a minimum of one dollar (\$1). Payment will not be considered late if payment is deposited electronically in Vendor's bank account or if a check or warrant is postmarked within thirty (30) calendar days of Acceptance of the Software, Hardware Products or Services, or receipt of Vendor's properly prepared invoice, whichever is later.

## **8. Overpayments to Vendor**

Vendor shall refund to Purchaser the full amount of any erroneous payment or overpayment under this Contract within thirty (30) days' written notice. If Vendor fails to make timely refund, Purchaser may charge Vendor one percent (1%) per month on the amount due, until paid in full.

## **9. Performance Bond**

- 9.1. At its own cost, Vendor shall furnish WSDOT with a bond in an amount equal to 25% of the total amount of the fixed bid cost within thirty (30) calendar days of the Execution Date of the RCS contract. This bond shall be in a form and substance reasonably satisfactory to WSDOT. Vendor shall maintain the bond in full force and effect during the term of this Contract. Any change or extension of time, or termination of this Contract shall in no way release Vendor or any of its sureties from any of their obligations under the bond. The bond shall contain a waiver of notice of any changes to this Agreement or the System.
- 9.2. No payment shall be due to the Vendor until the performance bond is in place and approved by WSDOT in writing. A licensed insurance company authorized to do business in the State of Washington shall issue the performance bond, which shall be made payable to WSDOT. The Contract number and dates of performance shall be specified in the performance bond. In the event that WSDOT exercises an option to extend the Contract for any additional period(s), the Vendor shall extend the validity and enforcement of the bond for said periods.
- 9.3. The performance bond shall secure the performance of the Vendor, including without limitation performance of the Services in accordance with the Work Plan and providing Deliverables in accordance with the Specifications, and shall secure any damages, cost or expenses resulting from Vendor's default in performance hereunder. In the event of Vendor's default, the performance bond shall become payable to WSDOT for any outstanding damage claims or assessments against the Vendor. An amount up to the full amount of the performance bond may also be applied to the Vendor's liability for any administrative costs and/or excess costs incurred by WSDOT in obtaining similar



hardware, software, deliverables, other products and services to replace those not provided or rejected as a result of the Vendor's default. WSDOT may seek other remedies in addition to this stated liability.

## Software License

### 10. Software License

- 10.1. Vendor grants to Purchaser a non-exclusive, perpetual, site-wide, irrevocable license to use the Software and related documentation according to the terms and conditions of this Contract.
- 10.2. Purchaser may modify any Vendor Software and may combine such with other programs or materials to form a derivative work, provided that upon discontinuance or termination of the license, Vendor Software will be removed from the derivative work and, at Purchaser's option, either destroyed or returned to Vendor. In such situations, Purchaser retains a license only to use the Software in the derivative work.
- 10.3. Purchaser will not decompile or disassemble any Software provided under this Contract or modify Software that bears a copyright notice of any third party without the prior written consent of Vendor or Software owner.
- 10.4. Purchaser may copy each item of Software to multiple hard drives and network drives, whichever is applicable.
- 10.5. Purchaser will make and maintain no more than five (5) archival copies of each item of Software, and each copy will contain all legends and notices and will be subject to the same conditions and restrictions as the original. Purchaser may also make copies of the Software in the course of routine backups of hard drive(s) for the purpose of recovery of hard drive contents. Purchaser may use backup or archival copies of the Software, without reinstallation or interruption of production copy(ies), for disaster recovery exercises at its disaster recovery site(s), without additional charge. Purchaser may make these backup or archival copies available to the disaster recovery site(s)' employees who require use of the Software in order to assist Purchaser with disaster recovery exercises. Purchaser agrees that production use of the Software at the disaster recovery site(s) shall be limited to times when Purchaser's facilities, or any portion thereof, are inoperable due to emergency situations.
- 10.6. Freedom of Use. Vendor understands that Purchaser may provide information processing services to other users that are agencies of state government and other tax-supported entities. Vendor further understands that Purchaser or other users that are agencies of state government and other tax-supported entities may provide services to the public through Internet applications. Software delivered hereunder may be used in the delivery of these services. Vendor acknowledges and agrees that such use of Software products is acceptable under the licensing agreements contained herein.
- 10.7. Purchaser may move Software from one device to another provided such Software is completely removed from the first device after a reasonable testing period on the new device.

## 11. Software Ownership

Vendor shall maintain all title, copyright, and other proprietary rights in the Software. Purchaser does not acquire any rights, express or implied, in the Software, other than those specified in this Contract. Vendor hereby warrants and represents to Purchaser that Vendor is the owner of the Software licensed hereunder or otherwise has the right to grant to Purchaser the licensed rights to the Software provided by Vendor through this Contract without violating any rights of any third party worldwide. Vendor represents and warrants that Vendor has the right to license the Software to Purchaser as provided in this Contract and that Purchaser's use of the Software and documentation within the terms of this Contract will not infringe upon any copyright, patent, trademark, or other intellectual property right worldwide or violate any third party's trade secret, contract, or confidentiality rights worldwide. Vendor represents and warrants that: (i) Vendor is not aware of any claim, investigation, litigation, action, suit or administrative or judicial proceeding pending or threatened based on claims that the Software infringes any patents, copyrights, or trade secrets of any third party, and (ii) that Vendor has no actual knowledge that the Software infringes upon any patents, copyrights, or trade secrets of any third party.

## 12. Software Code Escrow

- 12.1. Source Code Escrow Package Definition. The term "Source Code Escrow Package" shall mean:
  - a) A complete copy in machine-readable form of the source code and executable code of the licensed Software;
  - b) A complete copy of any existing design documentation and user documentation; and/or
  - c) Complete instructions for compiling and linking every part of the source code into executable code for purposes of enabling verification of the completeness of the source code as provided below. Such instructions shall include precise identification of all compilers, library packages, and linkers used to generate executable code.
- 12.2. Delivery of Source Code into Escrow. Vendor shall deliver a Source Code Escrow Package to Escrow Agent, provided that Vendor, Purchaser, and Escrow Agent shall first enter into a supplementary escrow agreement substantially similar in form to that attached as Schedule B – *Escrow Agreement*. Vendor and Purchaser shall use best efforts to enter into such an Escrow Agreement as soon as possible after the Effective Date of this Contract, but not later than thirty (30) days after the Effective Date of this Contract.
- 12.3. Delivery of New Source Code into Escrow. If during the term of this Contract, term of license, or term of maintenance and support, Vendor provides Purchaser with a maintenance release or upgrade version of the licensed Software, Vendor shall within ten (10) Business Days deposit with Escrow Agent a Source Code Escrow Package for the maintenance release or upgrade version and give Purchaser notice of such delivery.
- 12.4. Verification of Source Code Escrow Package. At its option and expense, Purchaser may request that the completeness and accuracy of any Source Code Escrow Package be verified.
  - a) Such verification may be requested once per Source Code Escrow Package.



- b) Such verification will be conducted by Escrow Agent or, upon at least ten (10) Business Days' prior notice to Vendor, by another party ("Verifier") acceptable to Vendor, after full disclosure to Vendor of information reasonably requested by Vendor about Verifier.
  - c) Prior to conducting the verification, Verifier shall first execute a confidentiality agreement prepared by Vendor that precludes Verifier from disclosing any information to Purchaser about the Source Code Escrow Package other than whether the Source Code Escrow Package was found to be complete and accurate.
  - d) Unless otherwise agreed at the time by Vendor and Purchaser, verification will be performed on-site at Vendor's premises, utilizing Vendor's Hardware and software, at a time reasonably acceptable to Vendor. Vendor shall make technical and support personnel available as reasonably necessary for the verification.
  - e) At its discretion, Vendor may designate a representative to accompany the Source Code Escrow Package at all times, and to be present at the verification. Verifier will be Purchaser's sole representative at the verification.
  - f) Verifier is solely responsible for the completeness and accuracy of the verification. Neither the Escrow Agent, if different from the Verifier, nor Vendor shall have any responsibility or liability to Purchaser for any incompleteness or inaccuracy of any verification.
- 12.5. Escrow Fees. All fees and expenses charged by Escrow Agent will be borne by Vendor.
- 12.6. Release Events for Source Code Escrow Packages. The Source Code Escrow Package may be released from escrow to Purchaser, temporarily or permanently, solely upon the occurrence of one or more of the following "Escrow Release Events:"
- a) Vendor becomes insolvent, makes a general assignment for the benefit of creditors, files a voluntary petition of bankruptcy, suffers or permits the appointment of a receiver for business or assets, or becomes subject to any proceeding under any bankruptcy or insolvency law, whether domestic or foreign;
  - b) Vendor has wound up or liquidated its business voluntarily or otherwise and Purchaser has compelling reasons to believe that such events will cause Vendor to fail to meet its warranties and maintenance obligations in the foreseeable future; or
  - c) Vendor has voluntarily or otherwise discontinued support of the Software or fails to support the Software in accordance with its warranties and maintenance obligations.
- 12.7. Release Event Procedures. If Purchaser desires to obtain the Source Code Escrow Package from Escrow Agent:
- a) Purchaser shall comply with the procedures set forth in the Escrow Agreement to document the occurrence of the Release Event;
  - b) Purchaser shall maintain all materials and information comprising the Source Code Escrow Package in confidence in accordance with the Contract section titled Vendor's Proprietary Information;

- c) If the release is temporary, Purchaser shall promptly return all released materials to Vendor when the circumstances leading to the release are no longer in effect; and
- d) Purchaser shall promptly, fully, and completely respond to any and all requests for information from Vendor concerning Purchaser's use or contemplated use of the Source Code Escrow Package.

### 13. Ownership/Rights in Data

- 13.1. Purchaser and Vendor agree that all data and work products (collectively called "Work Product") produced pursuant to this Contract shall be considered work made for hire under the U.S. Copyright Act, 17 U.S.C. §101 *et seq*, and shall be owned by Purchaser. Vendor is hereby commissioned to create the Work Product. Work Product includes, but is not limited to, discoveries, formulae, ideas, improvements, inventions, methods, models, processes, techniques, findings, conclusions, recommendations, reports, designs, plans, diagrams, drawings, Software, databases, documents, pamphlets, advertisements, books, magazines, surveys, studies, computer programs, films, tapes, and/or sound reproductions, to the extent provided by law. Ownership includes the right to copyright, patent, register and the ability to transfer these rights and all information used to formulate such Work Product.
- 13.2. If for any reason the Work Product would not be considered a work made for hire under applicable law, Vendor assigns and transfers to Purchaser the entire right, title and interest in and to all rights in the Work Product and any registrations and copyright applications relating thereto and any renewals and extensions thereof.
- 13.3. Vendor shall execute all documents and perform such other proper acts as Purchaser may deem necessary to secure for Purchaser the rights pursuant to this section.
- 13.4. Vendor shall not use or in any manner disseminate any Work Product to any third party, or represent in any way Vendor ownership in any Work Product, without the prior written permission of Purchaser. Vendor shall take all reasonable steps necessary to ensure that its agents, employees, or Subcontractors shall not copy or disclose, transmit or perform any Work Product or any portion thereof, in any form, to any third party.
- 13.5. Material that is delivered under this Contract, but that does not originate therefrom ("Preexisting Material"), shall be transferred to Purchaser with a nonexclusive, royalty-free, irrevocable license to publish, translate, reproduce, deliver, perform, display, and dispose of such Preexisting Material, and to authorize others to do so except that such license shall be limited to the extent to which Vendor has a right to grant such a license. Vendor shall exert all reasonable effort to advise Purchaser at the time of delivery of Preexisting Material furnished under this Contract, of all known or potential infringements of publicity, privacy or of intellectual property contained therein and of any portion of such document which was not produced in the performance of this Contract. Vendor agrees to obtain, at its own expense, express written consent of the copyright holder for the inclusion of Preexisting Material. Purchaser shall receive prompt written notice of each notice or claim of copyright infringement or infringement of other intellectual property right worldwide received by Vendor with respect to any Preexisting Material delivered under this Contract. Purchaser shall have the right to modify or remove any restrictive markings placed upon the Preexisting Material by Vendor.

#### **14. Compliance with Standards**

- 14.1. Vendor represents that all Software and elements thereof, including but not limited to, documentation and source code, shall meet and be maintained by Vendor to conform to the standards set forth in the Vendors RFP Response.

#### **15. Date Warranty**

Vendor warrants that all Software provided under this Contract: (i) does not have a life expectancy limited by date or time format; (ii) will correctly record, store, process, and present calendar dates; (iii) will lose no functionality, data integrity, or performance with respect to any date; and (iv) will be interoperable with other software used by Purchaser that may deliver date records from the Software, or interact with date records of the Software (“Date Warranty”). In the event a Date Warranty problem is reported to Vendor by Purchaser and such problem remains unresolved after three (3) calendar days, at Purchaser’s discretion, Vendor shall send, at Vendor’s sole expense, at least one (1) qualified and knowledgeable representative to Purchaser’s premises. This representative will continue to address and work to remedy the failure, malfunction, defect, or nonconformity on Purchaser’s premises. This Date Warranty shall last perpetually. In the event of a breach of any of these representations and warranties, Vendor shall indemnify and hold harmless Purchaser from and against any and all harm, injury, damages, costs, and expenses incurred by Purchaser arising out of said breach.

#### **16. Physical Media Warranty**

- 16.1. Vendor warrants to Purchaser that each licensed copy of the Software provided by Vendor is and will be free from physical defects in the media that tangibly embodies the copy (the “Physical Media Warranty”). The Physical Media Warranty does not apply to defects discovered more than thirty (30) calendar days after the date of Acceptance of the Software copy by Purchaser.
- 16.2. Vendor shall replace, at Vendor’s expense including shipping and handling costs, any Software copy provided by Vendor that does not comply with this warranty.

#### **17. No Surreptitious Code Warranty**

- 17.1. Vendor warrants to Purchaser that no licensed copy of the Software provided to Purchaser contains or will contain any Self-Help Code nor any Unauthorized Code as defined below. Vendor further warrants that Vendor will not introduce, via modem or otherwise, any code or mechanism that electronically notifies Vendor of any fact or event, or any key, node, lock, time-out, or other function, implemented by any type of means or under any circumstances, that may restrict Purchaser’s use of or access to any program, data, or Hardware based on any type of limiting criteria, including frequency or duration of use for any copy of the Software provided to Purchaser under this Contract. The warranty is referred to in this Contract as the “No Surreptitious Code Warranty.”
- 17.2. As used in this Contract, “Self-Help Code” means any back door, time bomb, drop dead device, or other software routine designed to disable a computer program automatically with the passage of time or under the positive control of a person other than a licensee of the Software. Self-Help Code does not include software routines in a computer program, if any, designed to permit an owner of the computer program (or other person acting by

authority of the owner) to obtain access to a licensee's computer system(s) (e.g., remote access via modem) solely for purposes of maintenance or technical support.

- 17.3. As used in this Contract, "Unauthorized Code" means any virus, Trojan horse, worm or other software routines or Hardware components designed to permit unauthorized access, to disable, erase, or otherwise harm Software, Hardware, or data; or to perform any other such actions. The term Unauthorized Code does not include Self-Help Code.
- 17.4. Vendor shall defend Purchaser against any claim, and indemnify Purchaser against any loss or expense arising out of any breach of the No Surreptitious Code Warranty. No limitation of liability, whether contractual or statutory, shall apply to a breach of this warranty.

## **18. Reauthorization Code Required**

Vendor's Software shall not require a reauthorization code in order for the Software to remain functional upon Purchaser's movement of the Software to another computer system.

## **19. Software Documentation**

Vendor shall provide two (2) complete sets of documentation for each Software order, including technical, maintenance, and installation information as agreed upon in the final Statement of Work. Vendor shall also provide two (2) complete sets of documentation for each updated version of Software that Vendor provides pursuant to the **Software Upgrades and Enhancements** section. Vendor shall provide the documentation on or before the date Vendor delivers its respective Software. There shall be no additional charge for this documentation or the updates, in whatever form provided. Vendor's Software documentation shall be comprehensive, well structured, and indexed for easy reference. If Vendor maintains its technical, maintenance and installation documentation on a web site, Vendor may fulfill the obligations set forth in this section by providing Purchaser access to its web-based documentation information. Vendor may also provide such information on CD-ROM. Vendor grants Purchaser the right to make derivative works, update, modify, copy, or otherwise reproduce the documentation furnished pursuant to this section at no additional charge.

## **20. Title to "System"**

Upon successful completion of Acceptance Testing and receipt of Purchaser's letter of Acceptance, Vendor shall convey to Purchaser good title to the System free and clear of all liens, pledges, mortgages, encumbrances, or other security interests.

Subject to Ownership Rights in article 13, transfer of title to the System shall include an irrevocable, fully paid-up, perpetual license to use the internal code (embedded software) in system components. If Purchaser subsequently transfers title to the system to another entity, Purchaser shall have the right to transfer the license to use the internal code with the transfer of System title. A subsequent transfer of this software license shall be at no additional cost or charge to either Purchaser or Purchaser's transferee.

## **21. Hardware Compatibility/Specifications/Configurations**

- 21.1. Vendor shall notify Purchaser of the existence of any compatibility issues between Vendor's Hardware and Purchaser's already existing or planned for Hardware, Software, and cabling. Purchaser will provide Vendor timely access to necessary areas and

Hardware sites and shall provide Vendor with a list of any existing or planned for Hardware, Software, and cabling, as necessary.

- 21.2. Vendor warrants that each item of Hardware delivered hereunder will conform to that item's detailed Specifications in all respects including, but not limited to: physical characteristics, operating characteristics, space requirements, power requirements, maintenance or warranty characteristics, modularity, compatibility, and the like, as may be modified in writing and agreed to by the parties.
- 21.3. For the purpose of delivery and performance under this Contract, Hardware purchased hereunder shall be grouped together in one or more Hardware, firmware, and/or software configurations as set forth in Vendor's Response. Any such configuration shall be deemed incomplete and undelivered if any item of Hardware within that configuration has not been delivered, or if delivered, not installed or operational in accordance with this Contract's **Delivery** and **Installation** sections.
- 21.4. Purchaser shall have the right to connect the Hardware purchased hereunder to any Hardware manufactured or supplied by others including other computers, peripheral Hardware, terminal devices, communications Hardware, software and the like that interface with the Hardware purchased hereunder.
- 21.5. If requested by Purchaser, Vendor agrees to identify, on all items of Hardware supplied under this Contract, all appropriate test points for connecting commercially available Hardware monitors designed to measure system capacity, performance, or activity.

## Vendor's Responsibilities

### 22. Shipping and Risk of Loss

Vendor shall ship all Products purchased pursuant to this Contract, freight prepaid, FOD a Purchaser's destination as indicated below. The method of shipment shall be consistent with the nature of the Products and hazards of transportation. Regardless of FOD point, Vendor agrees to bear all risks of loss, damage, or destruction of the Products ordered hereunder that occurs prior to acceptance except loss or damage attributable to Purchaser's fault or negligence; and such loss, damage, or destruction shall not release Vendor from any obligation hereunder. After acceptance, the risk of loss or damage shall be borne by Purchaser, except loss or damage attributable to Vendor's fault or negligence.

### 23. Delivery

- 23.1. Vendor shall deliver the Products ordered pursuant to this Contract on or before, the Delivery Date. For any exception to this Delivery Date, Vendor must notify Purchaser and obtain prior approval in writing. Time is of the essence with respect to delivery and at Purchaser's option, Vendor may be subject to liquidated damages and/or termination of an order or of this Contract and/or other damages available under law for failure to deliver on time.
- 23.2. All deliveries made pursuant to this Contract must be complete. Unless Vendor has obtained prior written approval from Purchaser, which shall not be withheld unreasonably, incomplete deliveries or backorders will not be accepted. All packages must be accompanied by a packing slip that identifies all items included with the

shipment and the Purchaser's Order Document number. Vendor's delivery receipt must be signed by an authorized representative of Purchaser for all deliveries made hereunder.

## 24. Site Security

While on Purchaser's premises, Vendor, its agents, employees, or Subcontractors shall conform in all respects with physical, fire, or other security regulations.

## 25. Installation

Vendor shall install the RCS Software on Purchaser's designated Hardware in accordance with the Purchaser's policies and requirements.

- 25.1. Purchaser shall prepare the environment to house the RCS Hardware based upon written requirements provided by Vendor in its Response, as modified in writing and agreed to by the parties. Vendor's specialists shall be available to provide required consultation related to environment preparation at no extra cost to Purchaser apart from the costs presented in Vendor's Response. Any requirements for the environment not disclosed in Vendor's Response will be completed by Vendor at no additional cost to Purchaser.
- 25.2. Vendor is hereby notified that fiber optic, communications, control systems, and other types of cable (collectively called "cabling") may be located within Purchaser's grounds and facilities.
- 25.3. Before beginning work on or about Purchaser's premises, Vendor shall contact Purchaser's communications network control personnel to determine if Purchaser's cabling systems will be impacted and to make necessary arrangements. Prior to the commencement of any work that may impact underground utilities not owned by Purchaser, Vendor agrees to notify affected owners under the requirements of chapter 19.22 RCW, Underground Utilities.
- 25.4. Purchaser hereby permits Vendor to interface with such cabling and design engineering systems in support of the delivery of the Products and Services ordered under this Contract.
- 25.5. Vendor shall install the Hardware, ready for Acceptance Testing, on or before the Installation Date(s) as specified in the Vendors approved Statement of Work and Project Schedule. Failure to meet the Installation Date(s) may subject Vendor to liquidated damages and/or termination of an Order or of this Contract and other damages available under law, unless such failure is caused by acts or omissions of Purchaser.
- 25.6. After installing the RCS Hardware, Vendor shall provide Purchaser with documentation of a successful system audit, performed at Purchaser's installation site using Vendor's diagnostic routines, as approved by Purchaser, that demonstrates that the RCS Hardware meets or exceeds the Specifications. Vendor shall certify to Purchaser in writing that the RCS Hardware is ready for Acceptance Testing. If after reviewing such documentation Purchaser agrees that the RCS Hardware is ready for Acceptance Testing, Purchaser shall begin Acceptance Testing, as set forth in the section titled **Standard of Performance and Acceptance**.



## 26. Standard of Performance and Acceptance

- 26.1. This section establishes a Standard of Performance that must be met before Acceptance. This Standard of Performance is also applicable to any additional, replacement, or substitute Hardware products, Software and any Hardware products or Software that is modified by or with the written approval of Vendor after having been Accepted.
- 26.2. The Standard of Performance for the RCS System is defined as in RFP ACQ-2002-0703-RFP for A Turnkey Revenue Collection System.
- 26.3. The Effectiveness Level for a Product is the percentage of time in a month that the Product is functioning properly in accordance with its Specifications. The Effectiveness Level is determined by dividing the Operational Use Time of the Product by the sum of the Operational Use Time plus the Product Failure downtime, all of which shall be measured in hours and whole minutes. Operational Use Time for a Product is defined as the total time the Product would normally be used. Product Failure downtime is defined as the accumulated time during Operational Use time when work cannot be processed or accurately completed because of a Product Failure. Product Failure is defined as a malfunction in the Hardware or Software that prevents the accomplishment of the intended function(s) of the Product.
- 26.4. Downtime for each incident shall start from the time that Vendor knew or reasonably should have known of the Product Failure, or Purchaser makes a bona fide attempt to contact Vendor's designated representative at the prearranged contact point, whichever occurs earlier, until the Product is returned to fully operational status in conformance with its Specifications. During periods of Product Failure downtime, Purchaser may use operable Products when such action does not interfere with repair of the inoperable Product.
- 26.5. The Acceptance Testing period shall be one hundred twenty (120) calendar days starting from the day after the Revenue Collection System is installed and Vendor certifies that the system is ready for Acceptance Testing. Purchaser will review all pertinent data and shall maintain appropriate daily records to ascertain whether the Standard of Performance has been met.
- 26.6. In the event the System does not meet the Standard of Performance during the initial period of Acceptance Testing, Purchaser may, at its discretion, continue Acceptance Testing on a day-to-day basis until the Standard of Performance is met. If after one hundred eighty (180) calendar days the Revenue Collection System still has not met the Standard of Performance Purchaser may, at its option: (1) declare Vendor to be in breach of this Contract and terminate any Order or this Contract; or, (2) at the sole option of Purchaser, demand replacement of the Revenue Collection System from Vendor at no additional cost to Purchaser; or, (3) continue the Acceptance Testing for an additional thirty (30) calendar days. Purchaser's option to declare Vendor in breach and terminate any Order or this Contract, shall remain in effect until exercised or until such time as Acceptance Testing is successfully completed.
- 26.7. The Revenue Collection System shall not be accepted and final invoices shall not be paid until this Standard of Performance is met. The date of Acceptance shall be the first Purchaser Business Day following the successful Acceptance Testing period and shall be formalized in a notice of Acceptance from Purchaser to Vendor.
- 26.8. Monthly Performance Monitoring. Throughout the warranty period and the initial and subsequent maintenance terms of this Contract, Purchaser shall monitor the System to

ensure that it conforms to the Standard of Performance established in this Standard of Performance and Acceptance section. Should the Product fail to operate in conformance with the Standard of Performance for any thirty (30) calendar days period, Vendor shall take corrective action as directed by Purchaser and, if the Product is Hardware, credit Purchaser a portion of the maintenance fees paid as provided in subsection 31.10 below of the Hardware Maintenance section.

- 26.9. "IT IS AGREED AND UNDERSTOOD THAT ACCEPTANCE OF ANY DELIVERABLE BY PURCHASER, THE COMPLETED PRODUCT AND SERVICE REQUIRED BY THIS CONTRACT ("WORK PRODUCT"), TO THE LEVEL OF PERFORMANCE REQUIRED HEREIN, AND/OR PAYMENT FOR THE INDIVIDUAL ITEM OF WORK, PRODUCT OR COMPONENT PART SHALL NOT BE DEEMED AN ACCEPTANCE OF THE "WORK PRODUCT", FOR WHICH THIS CONTRACT HAS BEEN ISSUED."
- 26.10. "IT IS FURTHER AGREED AND UNDERSTOOD THAT THE ACCEPTANCE OF ANY INDIVIDUAL ITEM OF WORK, PRODUCT, OR COMPONENT PART BY PURCHASER, AND/OR THE PAYMENT FOR THE INDIVIDUAL ITEM OR WORK, PRODUCT, OR COMPONENT PART BY PURCHASER, SHALL NOT BE DEEMED A WAIVER OF PURCHASER'S RIGHT TO RECOVER FROM THE VENDOR, MONEY PURCHASER PAID TO THE VENDOR FOR THE INDIVIDUAL ITEMS OF WORK, PRODUCTS OR COMPONENT PARTS, IF THE VENDOR FAILS TO DELIVER TO PURCHASER THE DECISION TO DO SO SHALL BE THE SOLE OPTION OF PURCHASER, AS AN ALTERNATIVE TO THE REMEDIES PROVIDED BY SECTION 62.2 (TERMINATION FOR DEFAULT) OF THIS CONTRACT."

## **27. Software Warranty**

Vendor warrants that the Software shall be in good operating condition and shall conform to the Specifications for a period as specified in the vendor's response to the RFP, the Warranty Period. This Warranty Period begins the first day after the Acceptance Date. Vendor shall replace all Software that is defective or not performing in accordance with the Specifications, at Vendor's sole expense.

## **28. Software Upgrades and Enhancements**

Vendor shall:

- 28.1. Supply at no additional cost updated versions of the Software to operate on upgraded versions of operating systems, upgraded versions of firmware, or upgraded versions of Hardware;
- 28.2. Supply at no additional cost updated versions of the Software that encompass improvements, extensions, maintenance updates, error corrections, or other changes that are logical improvements or extensions of the original Software supplied to Purchaser; and
- 28.3. Supply at no additional cost interface modules that are developed by Vendor for interfacing the Software to other Software products.



## 29. Software Maintenance and Support Services

Vendor shall provide a replacement copy or correction service at no additional cost to Purchaser for any error, malfunction, or defect in Software that, when used as delivered, fails to perform in accordance with the Specifications and that Purchaser shall bring to Vendor's attention. Vendor shall undertake such correction service as set forth below and shall use its best efforts to make corrections in a manner that is mutually beneficial. Vendor shall disclose all known defects and their detours or workarounds to Purchaser.

In addition, Vendor shall provide the following Services:

- 29.1. Help Desk Services. Vendor shall provide Help Desk Services for reporting errors and malfunctions and trouble shooting problems. Vendor's Help Desk Services shall be web-based and/or by toll-free telephone lines and/or via e-mail. Vendor's Help Desk Services shall include but are not limited to the following Services:
  - a) Assistance related to questions on the use of the subject Software;
  - b) Assistance in identifying and determining the causes of suspected errors or malfunctions in the Software;
  - c) Advice on detours or workarounds for identified errors or malfunctions, where reasonably available;
  - d) Information on errors previously identified by Purchaser and reported to Vendor and detours to these where available; and
  - e) Advice on the completion and authorization for submission of the required form(s) reporting identified problems in the Software to Vendor.
- 29.2. On-line Support. Vendor may execute on-line diagnostics from a remote Vendor location solely to assist in the identification and isolation of suspected Software errors or malfunctions.
- 29.3. Error and Malfunction Service. Within two (2) Business Days of receiving oral or written notification by Purchaser of identified errors or malfunctions in the Software, Vendor will either:
  - a) Provide Purchaser with detour or code correction to the Software error or malfunctions. Each detour or code correction will be made available in the form of either a written correction notice or machine-readable media and will be accompanied by a level of documentation adequate to inform Purchaser of the problem resolved and any significant operational differences resulting from the correction that is known by Vendor, or
  - b) Provide Purchaser with a written response describing Vendor's then-existing diagnosis of the error or malfunction and generally outlining Vendor's then-existing plan and timetable, subject to Purchaser's approval, for correcting or working around the error or malfunction.
- 29.4. On-Call Support. If a problem occurs that significantly impacts Purchaser's usage of the Software and remains unidentified or unresolved after Purchaser has utilized the detour or code correction prescribed by Vendor pursuant to subsection 29.1 or 29.3 above, Vendor

will dispatch a qualified representative to the system location during Business Days and Hours. The representative must arrive within twenty four (24) hours following a call out request by WSDOT. This representative shall have the qualifications necessary to provide:

- a) Advice and assistance in diagnosis and identification of Software errors or malfunctions.
  - b) On-site consultation on correction or detour of identified errors or malfunctions.
- 29.5. When Vendor performs Services pursuant to this Contract that require the use of Purchaser's Hardware, Purchaser agrees to make the Hardware available at reasonable times and in reasonable time increments, and in no event will Purchaser charge Vendor for such use.
- 29.6. Maintenance Release Services. Vendor will provide error corrections and maintenance releases to the Software that have been developed by Vendor at no additional cost to Purchaser. Such releases shall be licensed to Purchaser pursuant to the terms and conditions of this Contract. Each maintenance release will consist of a set of programs and files made available in the form of machine-readable media and will be accompanied by a level of documentation adequate to inform Purchaser of the problems resolved including any significant differences resulting from the release that are known by Vendor. Vendor agrees that each maintenance release of Software will be compatible with the then-current unaltered release of Software applicable to the computer system.

### **30. Hardware Warranty**

- 30.1. Vendor warrants that the Hardware shall be in good operating condition and shall conform to the Specifications for such period as is specified in the vendor's RFP Response, the Warranty Period, commencing upon the first day after the Acceptance Date.
- 30.2. During the Warranty Period, Vendor shall adjust, repair, or replace all Hardware that is defective or not performing in conformance with the Specifications. All costs for such adjustments, repairs, or replacements, including all costs for replacing parts or units and their installation and any transportation and delivery fees, shall be at Vendor's expense. Any defective Hardware shall be repaired or replaced for Purchaser so that it conforms to the Specifications.
- 30.3. Vendor agrees that all warranty service provided hereunder shall be performed by manufacturer-trained, certified, and authorized technicians. Vendor further agrees to act as the sole point of contact for warranty service. Vendor warrants that it has or will obtain and pass through to Purchaser any and all warranties obtained or available from the Original Hardware Manufacturer (OEM), including any replacement, upgraded, or additional Hardware warranties.
- 30.4. Vendor shall provide Help Desk Services for reporting warranty issues and for troubleshooting problems. Vendor's Help Desk Services shall be web-based and accessible via e-mail or via one or more toll-free telephone lines.
- 30.5. Vendor shall provide escalation procedures to ensure that the proper level of attention and resources are directed towards resolution of Products and Services problems in a timely manner. The escalation procedures shall indicate the steps to be taken in response to a problem report, the contact information and title of Vendor's employee(s) responding

at each level and the elapsed time before the next level of response is invoked. In addition, Vendor shall provide a copy of its disaster recovery plan for managing crisis situations in order to help avoid or reduce the potential adverse affects of catastrophic events (e.g., floods, fires, earthquakes, fuel/gas leaks rendering a building unuseable, etc.). Vendor's problem escalation procedures and disaster recovery plan are provided in Schedule B.

- 30.6. Purchaser agrees that Vendor will not be liable for any damages caused by the Purchaser's actions or failure of Purchaser to fulfill any of its responsibilities for site installation.
- 30.7. THE WARRANTIES IN THIS CONTRACT REPLACE ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE.

### 31. Hardware Maintenance

At the expiration of the Warranty Period set forth in the section titled **Hardware Warranty**, Vendor shall provide maintenance services for the Hardware as described herein, at the Prices set forth on Schedule A.

- 31.1. Vendor shall keep the Hardware in good operating condition or restore it to good working order in accordance with the Specifications or, upon Purchaser's prior written approval, to current standards.
- 31.2. Vendor shall provide contracted maintenance support twenty four (24) hours per day, seven (7) days per week, every day of the year including all Purchaser and Vendor recognized holidays.
- 31.3. Purchaser shall provide Vendor access to the Hardware to perform maintenance service.
- 31.4. Preventive Maintenance. Vendor shall specify in writing the number of hours each Hardware item requires per month for preventive maintenance and the frequency and duration of such preventive maintenance. From this Vendor-supplied information Purchaser shall develop and provide to Vendor in writing the schedule within which Vendor shall provide preventive maintenance. This schedule may be modified as agreed in writing. In addition, preventive maintenance may be performed at a time convenient to Purchaser within or contiguous with remedial maintenance.
- 31.5. Remedial maintenance. Remedial maintenance shall be performed within two (2) hours after notification that Hardware is malfunctioning or inoperative. Vendor shall provide Purchaser with a designated point of contact and shall provide Help Desk services as set forth in the section titled **Hardware Warranty**.
- 31.6. Upon completion of each maintenance call, Vendor shall furnish a maintenance activity report to Purchaser, which shall include, as a minimum, the following:
  - a) Date and time notified;
  - b) Date and time of arrival;
  - c) Type and serial number(s) of machine(s);
  - d) Time spent for repair;

- e) Description of malfunction;
  - f) List of parts replaced; and
  - g) Additional charges, if applicable.
- 31.7. There shall be no additional maintenance charges for:
- a) Replacement parts;
  - b) Preventive maintenance, regardless of when performed;
  - c) Remedial maintenance required within a forty-eight (48) hour period due to recurrence of the same malfunction;
  - d) Time spent by maintenance personnel after arrival at the site awaiting the arrival of additional maintenance personnel and/or delivery of parts, tools or other required material; or
  - e) Remedial maintenance required when the scheduled preventive maintenance preceding the malfunction has not been performed.
- 31.8. Malfunctioning Hardware must be repaired or a replacement spare installed by Vendor's qualified field engineer no later than the close of business on the Business Day following notification of Hardware malfunction. Failure of Vendor to comply with this requirement shall be a failure to perform as contemplated by Section 68.
- 31.9. Guaranteed two hour Response Time
- a) For the term of maintenance service contracted for herein, Vendor shall provide Purchaser with a guaranteed two (2) hour maintenance response time for the Hardware purchased hereunder. Within two (2) hours after notification by Purchaser that Purchaser is experiencing Hardware problem(s), Vendor's qualified field engineer shall arrive at Purchaser's location to correct such problem. This guaranteed two (2) hour response service shall be available to Purchaser twenty four (24) hours per day, seven (7) days per week every day of the year including all Purchaser and Vendor recognized holidays.
  - b) If Vendor's maintenance personnel fail to arrive at Purchaser's installation site within two (2) hours, Vendor shall be assessed liquidated damages, as set forth in the subsection of this Contract titled **Liquidated Damages – Specific**, for each "late" hour or part thereof (prorated in whole minutes) beginning with the time of notification and ending with the time of arrival.
- 31.10. Maintenance Credits For Hardware Malfunction
- a) Vendor shall grant a credit to Purchaser for any Hardware being maintained by Vendor that fails to perform at an Effectiveness Level as specified in the section titled **Standard of Performance and Acceptance** during any month. The Effectiveness Level for an item of Hardware shall be defined and computed in the same manner as provided for in the **Standard of Performance and Acceptance** section of this Contract (see section **Error! Reference source not found.** above).

- b) The credit granted by Vendor shall be fifty percent (50%) of the monthly maintenance fee for each percentage point a machine falls below its required effectiveness level. For example if the credit is 50% and the actual effectiveness level for a machine is 88% instead of the required 90%, the maintenance credit would be 100% of the monthly maintenance fee for that month, i.e., 2 percentage points below the requirement so  $2 \times 50\% = 100\%$  credit.
- c) If the Hardware fails to operate at an Effectiveness Level established in **Standard of Performance and Acceptance** for two (2) consecutive months, it shall be considered a Failure to Perform.

#### 31.11. Local Support

Vendor's field engineers and maintenance technicians shall be based within King County.

### 32. Hardware and Maintenance Documentation

Vendor shall provide two (2) complete sets of documentation for each Hardware Order, including technical, electrical, maintenance, and installation information and will provide updated documentation for the term of this Contract. There shall be no additional charge for this documentation or the updates, in whatever form provided. Vendor's Hardware documentation shall be comprehensive, well structured, and indexed for easy reference. If Vendor maintains its technical, electrical, maintenance and installation documentation on a web site, Vendor may fulfill the obligations set forth in this section by providing Purchaser access to its web-based documentation information. Vendor may also provide such information on CD-ROM. Vendor grants Purchaser the right to make derivative works, update, modify, copy or otherwise reproduce the documentation furnished pursuant to this section at no additional charge.

### 33. Depot Maintenance Service

Spare Parts and Devices:

- Vendors who offer depot maintenance services must describe:
    - Location of their maintenance facilities
    - Guaranteed Hardware repair time(s)
    - Specific procedures customers must follow
    - Costs for depot maintenance services
- 33.1. WSDOT/WSF plans to acquire a supply of spare parts so WSDOT/WSF support staff can replace certain pieces of non-functioning Hardware. WSDOT/WSF plans to acquire three (3) complete configured spare seller point-of-sale devices that can be used when it appears necessary to replace the entire point-of-sales device.
- 33.2. The Vendor must identify the numbers and types of spare parts and devices they recommend that WSDOT/WSF acquire, by location so WSDOT/WSF can maximize Hardware availability, beyond the spare point-of-sales devices listed above. Vendors must provide supporting documentation that led to their recommendations for the number of spare parts and devices. Vendor shall make available OEM replacement parts, or Purchaser-approved equivalent, for a minimum of five (5) years from the date of the initial delivery to Purchaser.

### 34. Vendor Commitments, Warranties and Representations

Any written commitment by Vendor within the scope of this Contract shall be binding upon Vendor. Failure of Vendor to fulfill such a commitment may constitute breach and shall render Vendor liable for damages under the terms of this Contract. For purposes of this section, a commitment by Vendor includes: (i) Prices, discounts, and options committed to remain in force over a specified period of time; and (ii) any warranty or representation made by Vendor in its Response or contained in any Vendor or manufacturer publications, written materials, schedules, charts, diagrams, tables, descriptions, other written representations, and any other communication medium accompanying or referred to in its Response or used to effect the sale to Purchaser.

### 35. Compliance with Standards

Vendor represents that all Hardware, Software, and elements thereof, including but not limited to documentation and source code, shall meet and be maintained by Vendor to conform to the standards set forth on Schedule B.

### 36. Training

Vendor agrees to provide RCS Hardware Product and Software training as set forth in WSDOT/WSF' request for proposal ACQ-2002-0703-RFP, in accordance with the costs set forth in Appendix F – RCS Cost Worksheet.

- 36.1. The training fee, whether separately stated under the pricing provisions of this Contract or included in the cost of the System, shall cover all costs of training. Purchaser shall not be responsible for any additional manufacturer's costs for training required pursuant to this section.
- 36.2. Purchaser shall have the right, so long as the Systems Hardware and Software licensed or purchased hereunder is in use by Purchaser, to give instruction to Purchaser's personnel in all courses described above without charge, using materials supplied by Vendor. Such use by Purchaser of Vendor's materials shall include the right to reproduce the same solely for the permitted use, which use and reproduction shall not be a violation or infringement upon any patent, copyright, or other proprietary right of Vendor. Vendor grants to Purchaser the right to make derivative works, update, modify, copy, or otherwise reproduce the documentation furnished pursuant to this section at no additional charge.
- 36.3. At the time of RCS installation, Vendor agrees to provide initial use training and a six-month follow up training session, both at the installation site, for a minimum of ten (10) of Purchaser's staff. Such training shall be sufficiently thorough to instruct, and certify, if required, such staff in the use of the System. This will include, at a minimum, orientation and familiarization training on all aspects of the System. Initial training shall be completed in time for the staff to operate the Hardware in the required fashion with minimum Vendor aid by the installation date.
- 36.4. The starting dates of the training will be as agreed by the parties.

### 37. Protection of Purchaser's Confidential Information

- 37.1. Vendor acknowledges that some of the material and information that may come into its possession or knowledge in connection with this Contract or its performance may consist of information that is exempt from disclosure to the public or other unauthorized persons under either chapter 42.17 RCW or other state or federal statutes ("Confidential Information"). Confidential Information may include, but is not limited to, names, addresses, Social Security numbers, e-mail addresses, telephone numbers, financial profiles, credit card, debit card information, driver's license numbers, medical data, law enforcement records, agency source code or object code, agency security data, or information identifiable to an individual that relates to any of these types of information. Vendor agrees to hold Confidential Information in strictest confidence and not to make use of Confidential Information for any purpose other than the performance of this Contract, to release it only to authorized employees or Subcontractors requiring such information for the purposes of carrying out this Contract, and not to release, divulge, publish, transfer, sell, disclose, or otherwise make the information known to any other party without Purchaser's express written consent or as provided by law. Vendor agrees to release such information or material only to employees or Subcontractors who have signed a nondisclosure agreement, the terms of which have been previously approved by Purchaser. Vendor agrees to implement physical, electronic, and managerial safeguards to prevent unauthorized access to Confidential Information.
- 37.2. Immediately upon expiration or termination of this Contract, Vendor shall, at Purchaser's option: (i) certify to Purchaser that Vendor has destroyed all Confidential Information; or (ii) return all Confidential Information to Purchaser; or (iii) take whatever other steps Purchaser requires of Vendor to protect Purchaser's Confidential Information.
- 37.3. Vendor shall maintain a log documenting the following: the Confidential Information received in the performance of this Contract; the purpose(s) for which the Confidential Information was received; who received, maintained and used the Confidential Information; and the final disposition of the Confidential Information. Vendor's records shall be subject to inspection, review or audit in accordance with **Review of Vendor's Records**.
- 37.4. Purchaser reserves the right to monitor, audit, or investigate the use of Confidential Information collected, used, or acquired by Vendor through this Contract. The monitoring, auditing, or investigating may include, but is not limited to, salting databases.
- 37.5. Violation of this section by Vendor or its Subcontractors may result in termination of this Contract and demand for return of all Confidential Information, monetary damages, or penalties.

## Contract Administration

### 38. Legal Notices

- 38.1. Any notice or demand or other communication required or permitted to be given under this Contract or applicable law shall be effective only if it is in writing and signed by the applicable party, properly addressed, and either delivered in person, or by a recognized courier service, or deposited with the United States Postal Service as first-class mail, postage prepaid *[certified mail, return receipt requested, via facsimile or by electronic mail]*, to the parties at the addresses *[and fax number, e-mail addresses]* provided in this section. For purposes of complying with any provision in this Contract or applicable law



that requires a “writing,” such communication, when digitally signed with a Washington State Licensed Certificate, shall be considered to be “in writing” or “written” to an extent no less than if it were in paper form.



**To Vendor at:**

*[Vendor]*

**Attn:**

*[Vendor address]*

Phone:

Fax:

E-mail:

**To Purchaser at:**

State of Washington

*[Purchaser]*

**Attn:** *[Purchaser Contract Administrator]*

*[Purchaser address]*

Phone:

Fax:

E-mail:

- 38.2. Notices shall be effective upon receipt or four (4) Business Days after mailing, whichever is earlier. The notice address as provided herein may be changed by written notice given as provided above.
- 38.3. In the event that a subpoena or other legal process commenced by a third party in any way concerning the Software or Services provided pursuant to this Contract is served upon Vendor or Purchaser, such party agrees to notify the other party in the most expeditious fashion possible following receipt of such subpoena or other legal process. Vendor and Purchaser further agree to cooperate with the other party in any lawful effort by the other party to contest the legal validity of such subpoena or other legal process commenced by a third party.

**39. Vendor Account Manager**

Vendor shall appoint an Account Manager for Purchaser's account under this Contract who will provide oversight of Vendor activities conducted hereunder. Vendor's Account Manager will be the principal point of contact for Purchaser concerning Vendor's performance under this Contract. Vendor shall notify Purchaser Contract Administrator and Purchaser Project Manager, in writing, when there is a new Vendor Account Manager assigned to this Contract. The Vendor Account Manager information is:

Vendor Account Manager:

Address:

Phone:

Fax:

E-mail:

**40. Purchaser Project Manager**

Purchaser shall appoint *[name]* who will be the Purchaser's Project Manager for this Contract and will provide oversight of the activities conducted hereunder. Purchaser's Project Manager will be the principal contact for Vendor concerning business activities under this Contract. Purchaser shall notify Vendor, in writing, when there is a new Purchaser's Project Manager assigned to this Contract.

#### 41. Section Headings, Incorporated Documents and Order of Precedence

- 41.1. The headings used herein are inserted for convenience only and shall not control or affect the meaning or construction of any of the sections.
- 41.2. Each of the documents listed below is, by this reference, incorporated into this Contract as though fully set forth herein and in the event of any inconsistency in this Contract, the inconsistency shall be resolved in the following order of precedence:
  - a) Applicable federal and state statutes, laws, and regulations;
  - b) Paragraphs 1 through 79 of the these Contract provisions;
  - c) Exhibit A: Department of Transportation's Request for Proposals dated \_\_\_\_;
  - d) Exhibit B: Statement of Work;
  - e) Vendor's Response to RFP dated *[date]*;
  - f) Schedule A, Authorized Product and/or Price List;
  - g) Appendix K, Escrow Agreement;
  - h) The terms and conditions contained on Purchaser's order documents, if used; and
  - i) All Vendor or manufacturer publications, written materials and schedules, charts, diagrams, tables, descriptions, other written representations and any other supporting materials Vendor made available to Purchaser and used to effect the sale of Software to Purchaser.

#### 42. Entire Agreement

This Contract sets forth the entire agreement between the parties with respect to the subject matter hereof and except as provided in the section titled **Vendor Commitments, Warranties and Representations**, understandings, agreements, representations, or warranties not contained in this Contract or a written amendment hereto shall not be binding on either party. Except as provided herein, no alteration of any of the terms, conditions, delivery, Price, quality, or Specifications of this Contract will be effective without the written consent of both parties.

#### 43. Authority for Modifications and Amendments

No modification, amendment, alteration, addition, or waiver of any section or condition of this Contract shall be effective or binding unless it is in writing and signed by Purchaser and Vendor Contracting Officers. Only Purchaser Contracting Officer shall have the express, implied, or apparent authority to alter, amend, modify, add, or waive any provision, benefit or obligation of this Contract on behalf of Purchaser.

#### 44. Independent Status of Vendor

In the performance of this Contract, the parties will be acting in their individual, corporate or governmental capacities and not as agents, employees, partners, joint ventures, or associates of one another. The parties intend that an independent contractor relationship will be created by this Contract. The employees or agents of one party shall not be deemed or construed to be the employees or agents of the other party for any purpose whatsoever. Vendor shall not make any claim of right, privilege or benefit, which would accrue to an employee under chapter 41.06 RCW or Title 51 RCW.

#### 45. Governing Law

This Contract shall be governed in all respects by the law and statutes of the state of Washington, without reference to conflict of law principles. However, if the Uniform Computer Information Transactions Act (UCITA) or any substantially similar law is enacted as part of the law of the state of Washington, said statute will not govern any aspect of this Contract or any license granted hereunder, and instead the law as it existed prior to such enactment would govern. The jurisdiction for any action hereunder shall be exclusively in the Superior Court for the state of Washington. The venue of any action hereunder shall be in the Superior Court for Thurston County, Washington.

#### 46. Subcontractors

46.1. Vendor may, with prior written permission from Purchaser Contracting Officer, which consent shall not be unreasonably withheld, enter into subcontracts with third parties for its performance of any part of Vendor's duties and obligations. In no event shall the existence of a subcontract operate to release or reduce the liability of Vendor to Purchaser for any breach in the performance of Vendor's duties. For purposes of this Contract, Vendor agrees that all Subcontractors shall be held to be agents of Vendor. Vendor shall be liable for any loss or damage to Purchaser, including but not limited to personal injury, physical loss, harassment of Purchaser employee, or violations of the **Patent and Copyright Indemnification, Protection of Purchaser's Confidential Information, Ownership/Rights in Data, and Software Ownership** sections of this Contract occasioned by the acts or omissions of Vendor's Subcontractors, their agents or employees. The **Patent and Copyright Indemnification, Protection of Purchaser's Confidential Information, Ownership/Rights in Data, Software Ownership, Publicity and Review of Vendor's Records** sections of this Contract shall apply to all Subcontractors.

46.2. The Contractor shall not enter into subcontracts for any of the work contemplated under this Contract without prior written approval of the WSDOT Contracting Officer.

If, at any time during the progress of the Statement of Work, the WSDOT determines in its sole judgment that any subcontractor is incompetent or undesirable, the WSDOT shall notify the Contractor, and the Contractor shall take immediate steps to terminate the subcontractor's involvement in the Statement of Work.

The rejection or approval by WSDOT of any subcontractor or the termination of a subcontractor shall not relieve the Contractor of any of its responsibilities under the Contract, or be the basis for additional charges to WSDOT.

- 46.3. The Contractor is solely responsible and liable for ensuring that the terms and conditions set forth in this Contract are incorporated into any partnering or subcontracting relationships with other entities for work related to this Contract. Liability includes management responsibility and quality assurance for work performed and financial responsibility for payments to and by partner organizations or subcontractor to others.
- 46.4. For work to be performed for WSDOT, WSDOT reserves the right to reject any of the Contractor's employees, suppliers, or subcontractors. Any and all costs or expenses associated with replacement of any person or entity shall be borne by the Contractor. WSDOT may, in the exercise of its discretion and judgment, identify certain of Contractor's employees as key personnel, and if so, the Contractor shall take all necessary steps to assure that said Contractor's employees are available and assigned to the Work as long as said employees are employed by Contractor.

The Contractor may not change or replace any of the staff assigned to this Contract without prior approval of WSDOT, which approval will not be unreasonably withheld. Contractor warrants that it is available to perform the work within the time specified and that all work will be performed on a priority basis. Contractor will begin work promptly and will perform the work in a continuous and diligent manner, and Contractor shall not interrupt the work except as may be provided under this Contract.

Contractor shall be responsible to ensure that all its employees and subcontractor's employees are properly trained, certified, or licensed as appropriate and are properly qualified by education and experience to perform the work. Contractor shall avoid overstaffing the work or shuffling personnel assigned to said work.

#### **47. Coordination and Cooperation**

Contractor shall cooperate with WSDOT and other firms, if any, to ensure that the work is properly performed on schedule. Contractor shall collaborate with any other firms and coordinate its work with the work of such other firm(s), if any, which could affect the work, and Contractor shall proceed in such manner as not to interfere or delay the progress of the work as a whole.

If any part of the Contractor's work depends for proper execution or results upon the work of any other contractor(s), the Contractor shall inspect and promptly report in writing to WSDOT any defects in the work of such other contractor that renders it unsuitable for such proper execution or results. Failure of the Contractor to do so shall constitute its acceptance of the other firm's work as fit and proper for the reception of Contractor's work, except as to defects that may develop in the other firms' work after the execution of the Contractor's work.

In cases of disagreement or disputes between the Contractor and other firm(s) which could delay or interfere with the work due to the failure to collaborate and cooperate or which cannot be resolved between Contractor and the others involved, WSDOT shall be given prompt written notice specifying in detail the disagreement or dispute. In such cases, WSDOT shall have the right to determine the proper method of coordinating the work, and WSDOT's decisions in this regard shall be final, binding, and conclusive.

Notwithstanding the existence of a dispute or disagreement between WSDOT and the Contractor, the Contractor shall diligently and without interruption proceed with the work at such rates of progress as will ensure full completion of the work on time.

**48. Assignment**

- 48.1. With the prior written consent of Purchaser Contracting Officer, which consent shall not be unreasonably withheld, Vendor may assign this Contract including the proceeds hereof, provided that such assignment shall not operate to relieve Vendor of any of its duties and obligations hereunder, nor shall such assignment affect any remedies available to Purchaser that may arise from any breach of the sections of this Contract, or warranties made herein including but not limited to, rights of setoff.
- 48.2. Purchaser may assign this Contract to any public agency, commission, board, or the like, within the political boundaries of the state of Washington, provided that such assignment shall not operate to relieve Purchaser of any of its duties and obligations hereunder.

**49. Publicity**

- 49.1. The award of this Contract to Vendor is not in any way an endorsement of Vendor or Vendor's products by Purchaser and shall not be so construed by Vendor in any advertising or other publicity materials.
- 49.2. Vendor agrees to submit to Purchaser, all advertising, sales promotion, and other publicity materials relating to this Contract or any Product furnished by Vendor wherein Purchaser's name is mentioned, language is used, or Internet links are provided from which the connection of Purchaser's name therewith may, in Purchaser's judgment, be inferred or implied. Vendor further agrees not to publish or use such advertising, sales promotion materials, publicity or the like through print, voice, the World Wide Web, and other communication media in existence or hereinafter developed without the express written consent of Purchaser *prior* to such use.
- 49.3. Either Party may use the other Party's name and logo (except for the State seal) in advertising, sales promotion, and other publicity materials relating to this Contract, without royalty, provided that this Contract and the relationship between the parties is not misrepresented and that the requirements of Section 49.2 of this contract are complied with.

**50. Review of Vendor's Records**

- 50.1. Vendor and its Subcontractors shall maintain books, records, documents and other evidence relating to this Contract, including but not limited to Minority and Women's Business Enterprise participation, protection and use of Purchaser's Confidential Information, and accounting procedures and practices which sufficiently and properly reflect all direct and indirect costs of any nature invoiced in the performance of this Contract. Vendor shall retain all such records for six (6) years after the expiration or termination of this Contract. Records involving matters in litigation related to this Contract shall be kept for either one (1) year following the termination of litigation, including all appeals, or six (6) years from the date of expiration or termination of this Contract, whichever is later.
- 50.2. All such records shall be subject at reasonable times and upon prior notice to examination, inspection, copying, or audit by personnel so authorized by the Purchaser's Contract Administrator and/or the Office of the State Auditor and federal officials so authorized by law, rule, regulation or contract, when applicable, at no additional cost to the State. During this Contract's term, Vendor shall provide access to these items within

King County. Vendor shall be responsible for any audit exceptions or disallowed costs incurred by Vendor or any of its Subcontractors.

- 50.3. Vendor shall incorporate in its subcontracts this section's records retention and review requirements.
- 50.4. It is agreed that books, records, documents, and other evidence of accounting procedures and practices related to Vendor's cost structure, including overhead, general and administrative expenses, and profit factors shall be excluded from Purchaser's review unless the cost or any other material issue under this Contract is calculated or derived from these factors.

## General Provisions

### 51. Patent and Copyright Indemnification

- 51.1. Vendor, at its expense, shall defend, indemnify, and save Purchaser harmless from and against any claims against Purchaser that any Work Product supplied hereunder, or Purchaser's use of the Work Products within the terms of this Contract, infringes any patent, copyright, utility model, industrial design, mask work, trade secret, trademark, or other similar proprietary right of a third party worldwide. Vendor shall pay all costs of such defense and settlement and any penalties, costs, damages and attorneys' fees awarded by a court or incurred by Purchaser provided that Purchaser:
  - a) Promptly notifies Vendor in writing of the claim, but Purchaser's failure to provide timely notice shall only relieve Vendor from its indemnification obligations if and to the extent such late notice prejudiced the defense or resulted in increased expense or loss to Vendor; and
  - b) Cooperates with Vendor in connection with the defense of the claim and all related settlement negotiations.
- 51.2. If such claim has occurred, or in Vendor's opinion is likely to occur, Purchaser agrees to permit Vendor, at its option and expense, either to procure for Purchaser the right to continue using the Work Product or to replace or modify the same so that they become noninfringing and functionally equivalent. If use of the Work Product is enjoined by a court and Vendor determines that none of these alternatives is reasonably available, Vendor, at its risk and expense, will take back the Work Product and provide Purchaser a refund. In the case of Work Product, Vendor shall refund to Purchaser the entire amount Purchaser paid to Vendor for Vendor's provision of the Work Product. In the case of Product, Vendor shall refund to Purchaser its depreciated value. No termination charges will be payable on such returned Product, and Purchaser will pay only those charges that were payable prior to the date of such return. Depreciated value shall be calculated on the basis of a useful life of four (4) years commencing on the date of purchase and shall be an equal amount per year over said useful life. The depreciation for fractional parts of a year shall be prorated on the basis of three hundred sixty-five (365) days per year. In the event the Product has been installed less than one (1) year, all costs associated with the initial installation paid by Purchaser shall be refunded by Vendor.
- 51.3. Vendor has no liability for any claim of infringement arising solely from:
  - a) Vendor's compliance with any designs, specifications or instructions of Purchaser;

- b) Modification of the Work Product by Purchaser or a third party without the prior knowledge and approval of Vendor; or
- c) Use of the Product Work Product in a way not specified by Vendor; unless the claim arose against Vendor's Product Work Product independently of any of these specified actions.

## 52. Save Harmless

Vendor shall defend, indemnify, and save Purchaser harmless from and against any claims, including reasonable attorneys' fees resulting from such claims, by third parties for any or all injuries to persons or damage to property of such third parties arising from intentional, willful or negligent acts or omissions of Vendor, its officers, employees, or agents, or Subcontractors, their officers, employees, or agents. Vendor's obligation to defend, indemnify, and save Purchaser harmless shall not be eliminated or reduced by any alleged concurrent Purchaser negligence.

## 53. Insurance

Vendor shall, during the term of this Contract, maintain in full force and effect, the insurance described in this section. Vendor shall acquire such insurance from an insurance carrier or carriers licensed to conduct business in the state of Washington having a rating of A-, Class VII or better, in the most recently published edition of *Best's Reports*. In the event of cancellation, non-renewal, revocation, or other termination of any insurance coverage required by this Contract, Vendor shall provide written notice of such to Purchaser within one (1) Business Day of Vendor's receipt of such notice. Failure to buy and maintain the required insurance may, at Purchaser's sole option, result in this Contract's termination. **Furthermore, within 14 days of the execution of this contract, Vendor shall deliver to Purchaser certificates of insurance evidencing the requirements of insurance required by this contract.**

53.1. The minimum acceptable limits shall be as indicated below, with no deductible for each of the following categories:

- a) Commercial General Liability covering the risks of bodily injury (including death), property damage and personal injury, including coverage for contractual liability, with a limit of not less than \$1 million per occurrence/\$2 million general aggregate;
- b) Business Automobile Liability (owned, hired, or non-owned) covering the risks of bodily injury (including death) and property damage, including coverage for contractual liability, with a limit of not less than \$1 million per accident;
- c) Employers Liability insurance covering the risks of Vendor's employees' bodily injury by accident or disease with limits of not less than \$1 million per accident for bodily injury by accident and \$1 million per employee for bodily injury by disease;
- d) Umbrella policy providing excess limits over the primary policies in an amount not less than \$3 million;
- e) Professional Liability Errors and Omissions, with a deductible not to exceed \$25,000, conditioned upon subsection 53.2 below, and coverage of not less than \$1 million per occurrence/\$2 million general aggregate; and



- f) Crime Coverage with a deductible not to exceed \$1 million, conditioned upon subsection 53.2 below, and coverage of not less than \$5 million single limit per occurrence and \$10 million in the aggregate, which shall at a minimum cover occurrences falling in the following categories: Computer Fraud; Forgery; Money and Securities; and Employee Dishonesty.
- 53.2. For Professional Liability Errors and Omissions coverage and Crime Coverage, Vendor shall: (i) continue such coverage for six (6) years beyond the expiration or termination of this Contract, naming Purchaser as an additional insured and providing Purchaser with certificates of insurance on an annual basis; (ii) within thirty (30) days of execution of this Contract provide for Purchaser's benefit an irrevocable stand-by letter of credit, or other financial assurance acceptable to Purchaser, in the amount of \$1 million, during the initial and any subsequent terms of this Contract and for six (6) years beyond the expiration or termination of this Contract to pay for any premiums to continue such claims-made policies, or available tails, whichever is appropriate, at Purchaser's sole option, in the event Vendor fails to do so. In addition, such irrevocable stand-by letter of credit shall provide for payment of any deductible on the Professional Liability Errors and Omissions policy and the Crime Coverage under the same terms and conditions of such policy as though there were no deductible. "Irrevocable stand-by letter of credit" as used in this Contract means a written commitment by a federally insured financial institution to pay all or part of a stated amount of money, until the expiration date of the letter, upon presentation by Purchaser (the beneficiary) of a written demand therefor.
- 53.3. Vendor shall pay premiums on all insurance policies. Such insurance policies shall name Purchaser as an additional insured on all general liability, automobile liability, and umbrella policies. Such policies shall also reference this Contract number *[XXX-XXX-XXX]* and shall have a condition that they not be revoked by the insurer until forty-five (45) calendar days after notice of intended revocation thereof shall have been given to Purchaser by the insurer.
- 53.4. All insurance provided by Vendor shall be primary as to any other insurance or self-insurance programs afforded to or maintained by the State and shall include a severability of interests (cross-liability) provision.
- 53.5. Vendor shall include all Subcontractors as insured under all required insurance policies, or shall furnish separate certificates of insurance and endorsements for each Subcontractor. Subcontractor(s) shall comply fully with all insurance requirements stated herein. Failure of Subcontractor(s) to comply with insurance requirements does not limit Vendor's liability or responsibility.
- 53.6. Vendor shall furnish to Purchaser copies of certificates of all required insurance within thirty (30) calendar days of this Contract's Effective Date and copies of renewal certificates of all required insurance within thirty (30) days after the renewal date. These certificates of insurance must expressly indicate compliance with each and every insurance requirement specified in this section. Failure to provide evidence of coverage may, at Purchaser's sole option, result in this Contract's termination.
- 53.7. By requiring insurance herein, Purchaser does not represent that coverage and limits will be adequate to protect Vendor. Such coverage and limits shall not limit Vendor's liability under the indemnities and reimbursements granted to Purchaser in this Contract.



**54. Industrial Insurance Coverage**

Prior to performing work under this Contract, Vendor shall provide or purchase industrial insurance coverage for its employees, as may be required of an “employer” as defined in Title 51 RCW, and shall maintain full compliance with Title 51 RCW during the course of this Contract. Purchaser will not be responsible for payment of industrial insurance premiums or for any other claim or benefit for Vendor, or any Subcontractor or employee of Vendor, which might arise under the industrial insurance laws during the performance of duties and services under this Contract.

**55. Licensing Standards**

Vendor shall comply with all applicable local, state, and federal licensing, accreditation and registration requirements and standards necessary in the performance of this Contract. (See, for example, chapter 19.02 RCW for state licensing requirements and definitions.)

**56. OSHA/WISHA**

Vendor represents and warrants that its Products, when shipped, are designed and manufactured to meet then current federal and state safety and health regulations. Vendor agrees to indemnify and hold Purchaser harmless from all damages assessed against Purchaser as a result of the failure of the Products furnished under this Contract to so comply.

**57. Uniform Commercial Code (UCC) Applicability**

- 57.1. Except to the extent the sections of this Contract are clearly inconsistent, this Contract shall be governed by any applicable sections of the Uniform Commercial Code (UCC) as set forth in Title 62A RCW.
- 57.2. To the extent this Contract entails delivery or performance of services, such services shall be deemed “goods” within the meaning of the UCC, except when to do so would result in an absurdity.
- 57.3. In the event of any clear inconsistency or contradiction between this Contract and the UCC, the terms and conditions of this Contract take precedence and shall prevail unless otherwise provided by law.

**58. Antitrust Violations**

Vendor and Purchaser recognize that, in actual economic practice, overcharges resulting from antitrust violations are usually borne by Purchaser. Therefore, Vendor hereby assigns to Purchaser any and all claims for such overcharges as to goods and services purchased in connection with this Contract, except as to overcharges not passed on to Purchaser resulting from antitrust violations commencing after the date of the bid, quotation, or other event establishing the Price under this Contract.

**59. Compliance with Civil Rights Laws**

During the performance of this Contract, Vendor shall comply with all federal and applicable state nondiscrimination laws, including but not limited to: Title VII of the Civil Rights Act, 42 U.S.C. §12101 *et seq.*; the Americans with Disabilities Act (ADA); and Title 49.60 RCW, Washington Law Against Discrimination. In the event of Vendor’s noncompliance or refusal to

comply with any nondiscrimination law, regulation or policy, this Contract may be rescinded, canceled, or terminated in whole or in part under the **Termination for Default** sections, and Vendor may be declared ineligible for further contracts with Purchaser.

## 60. Severability

If any term or condition of this Contract or the application thereof is held invalid, such invalidity shall not affect other terms, conditions, or applications which can be given effect without the invalid term, condition, or application; to this end the terms and conditions of this Contract are declared severable.

## 61. Waiver

Waiver of any breach of any term or condition of this Contract shall not be deemed a waiver of any prior or subsequent breach. No term or condition of this Contract shall be held to be waived, modified, or deleted except by a written instrument signed by the parties.

## 62. Treatment of Assets

- 62.1. Title to all property furnished by Purchaser shall remain in Purchaser. Title to all property furnished by Vendor, for which Vendor is entitled to reimbursement, other than rental payments, under this Contract, shall pass to and vest in Purchaser pursuant to the **Title to System** section. As used in this section **Treatment of Assets**, if the “property” is Vendor’s proprietary, copyrighted, patented, or trademarked works, only the applicable license, not title, is passed to and vested in Purchaser.
- 62.2. Any Purchaser property furnished to Vendor shall, unless otherwise provided herein or approved by Purchaser, be used only for the performance of this Contract.
- 62.3. Vendor shall be responsible for any loss of or damage to property of Purchaser that results from Vendor’s negligence or that results from Vendor’s failure to maintain and administer that property in accordance with sound management practices.
- 62.4. Upon loss or destruction of, or damage to any Purchaser property, Vendor shall notify Purchaser thereof and shall take all reasonable steps to protect that property from further damage.
- 62.5. Vendor shall surrender to Purchaser all Purchaser property prior to settlement upon completion, termination, or cancellation of this Contract.
- 62.6. All reference to Vendor under this section shall also include Vendor’s employees, agents, or Subcontractors.

## 63. Vendor’s Proprietary Information

Vendor acknowledges that Purchaser is subject to chapter 42.17 RCW and that this Contract shall be a public record as defined in chapter 42.17 RCW. Any specific information that is claimed by Vendor to be Proprietary Information must be clearly identified as such by Vendor. To the extent consistent with chapter 42.17 RCW, Purchaser shall maintain the confidentiality of all such information marked Proprietary Information. If a public disclosure request is made to view Vendor’s Proprietary Information, Purchaser will notify Vendor of the request and of the date that such records will be released to the requester unless Vendor obtains a court order from a court of

competent jurisdiction enjoining that disclosure. If Vendor fails to obtain the court order enjoining disclosure, Purchaser will release the requested information on the date specified.

## Disputes and Remedies

In the event a dispute arises under this Contract, a Dispute Resolution Panel shall handle it in the following manner. Each party to this Contract shall appoint one member to the Panel. These two appointed members shall jointly appoint an additional member. The Dispute Resolution Panel shall review the facts, Contract terms and applicable statutes and rules and make a determination of the dispute as quickly as reasonably possible. Purchaser and Vendor agree that, the existence of a dispute notwithstanding, they will continue without delay to carry out all their respective responsibilities under this Contract that are not affected by the dispute.

### 64. Disputes

- 64.1. In the event a bona fide dispute concerning a question of fact arises between Purchaser and Vendor and it cannot be resolved between the parties, either party may initiate the dispute resolution procedure provided herein.
- 64.2. The initiating party shall reduce its description of the dispute to writing and deliver it to the responding party. The responding party shall respond in writing within three (3) Business Days. The initiating party shall have three (3) Business Days to review the response. If after this review resolution cannot be reached, both parties shall have three (3) Business Days to negotiate in good faith to resolve the dispute.
  - a) If the dispute cannot be resolved after three (3) Business Days, a Dispute Resolution Panel may be requested in writing by either party who shall also identify the first panel member. Within three (3) Business Days of receipt of the request, the other party will designate a panel member. Those two panel members will appoint a third individual to the dispute resolution panel within the next three (3) Business Days.
  - b) The Dispute Resolution Panel will review the written descriptions of the dispute, gather additional information as needed, and render a decision on the dispute in the shortest practical time.
  - c) Each party shall bear the cost for its panel member and share equally the cost of the third panel member.
- 64.3. Unless irreparable harm will result, neither party shall commence litigation against the other before the Dispute Resolution Panel has issued its decision on the matter in dispute.
- 64.4. Both parties agree to exercise good faith in dispute resolution and to settle disputes prior to using a Dispute Resolution Panel whenever possible. Purchaser and Vendor agree that, the existence of a dispute notwithstanding, they will continue without delay to carry out all their respective responsibilities under this Contract that are not affected by the dispute.
- 64.5. If the subject of the dispute is the amount due and payable by Purchaser for Services being provided by Vendor, Vendor shall continue providing Services pending resolution of the dispute provided Purchaser pays Vendor the amount Purchaser, in good faith, believes is due and payable, and places in escrow the difference between such amount and the amount Vendor, in good faith, believes is due and payable.

## 65. Attorneys' Fees and Costs

- 65.1. In the event that the parties engage in arbitration, mediation or any other alternative dispute resolution forum to resolve a dispute in lieu of litigation, both parties shall share equally in the cost of the alternative dispute resolution method, including cost of mediator or arbitrator. In addition, each party shall be responsible for its own attorneys' fees incurred as a result of the alternative dispute resolution method.

## 66. Non-Exclusive Remedies

The remedies provided for in this Contract shall not be exclusive but are in addition to all other remedies available under law.

## 67. Liquidated Damages

### 67.1. Liquidated Damages – General

- a) Any delay by Vendor in meeting the Implementation Date set forth in this Contract will interfere with the proper implementation of Purchaser's programs and will result in loss and damage to Purchaser.
- b) As it would be impracticable to fix the actual damage sustained in the event of any such failure(s) to perform, Purchaser and Vendor agree that in the event of any such failure(s) to perform, the amount of damage which will be sustained will be the amount set forth in the following subsections and the parties agree that Vendor shall pay such amounts as liquidated damages and not as a penalty.
- c) Liquidated damages provided under the terms of this Contract are subject to the same limitations as provided in the section titled **Limitation of Liability**.

### 67.2. Liquidated Damages – Specific

- a) If Vendor does not have the Revenue Collection System's Hardware and Software delivered and ready for Beta testing by the date identified in the Statement of Work, then Vendor shall provide a revised schedule and pay to Purchaser \$1,000.00 per day, as a fixed and agreed liquidated damages, in lieu of all other damages due to such delay, for each calendar day between the specified Implementation Date and the date that Vendor actually delivers the Revenue Collection System and it is operational in accordance with the **Standard of Performance and Acceptance** section.
- b) If the revised Implementation Date is more than sixty (60) calendar days from the original Implementation Date, then by written notice to Vendor, Purchaser may immediately terminate the right of Vendor to deliver the Revenue Collection System and Purchaser may obtain a substitute Revenue Collection System from another vendor. In this event, Vendor shall be liable for fixed and agreed-upon liquidated damages, in lieu of all other damages due to such delay, in the amount specified above, until the substitute Revenue Collection System is installed, or a maximum of one hundred eighty (180) calendar days from the original Revenue Collection System Implementation Date, whichever occurs first.

- c) If the RCS Vendor causes delays in the Regional Fare Coordination System project schedule the RCS Vendor shall be liable for damages resulting from such delays.
- d) If Vendor's maintenance personnel fail to arrive at Purchaser's site within two (2) hour after notification by Purchaser that maintenance is required, Vendor shall pay to Purchaser as fixed and agreed liquidated damages, in lieu of all other damages due to such non-responsiveness, for each hour between the agreed two (2) hour response time and the actual response time an amount of two hundred dollars (\$200.00) per hour for each "late" hour or part thereof (prorated) beginning with the time of notification by Purchaser and ending with the time that Vendor's maintenance personnel arrive at Purchaser's site.

## 68. Failure to Perform

If Vendor fails to perform any substantial obligation under this Contract, Purchaser shall give Vendor written notice of such Failure to Perform. If after thirty (30) calendar days from the date of the written notice Vendor still has not performed, then Purchaser may withhold all monies due and payable to Vendor, without penalty to Purchaser, until such Failure to Perform is cured or otherwise resolved.

## 69. Limitation of Liability

- 69.1. The parties agree that neither Vendor nor Purchaser shall be liable to each other, regardless of the form of action, for consequential, incidental, indirect, or special damages except a claim related to bodily injury or death, or a claim or demand based on a Date Warranty or No Surreptitious Code Warranty issue or patent, copyright, or other intellectual property right infringement, in which case liability shall be as set forth elsewhere in this Contract. This section does not modify any sections regarding liquidated damages or any other conditions as are elsewhere agreed to herein between the parties. The damages specified in the sections titled **OSHA/WISHA**, **Termination for Default**, and **Review of Vendor's Records** are not consequential, incidental, indirect, or special damages as that term is used in this section.
- 69.2. Neither Vendor nor Purchaser shall be liable for damages arising from causes beyond the reasonable control and without the fault or negligence of either Vendor or Purchaser. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of a governmental body other than Purchaser acting in either its sovereign or contractual capacity, war, explosions, fires, floods, earthquakes, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the delays must be beyond the reasonable control and without fault or negligence of Vendor, Purchaser, or their respective Subcontractors.
- 69.3. If delays are caused by a Subcontractor without its fault or negligence, Vendor shall not be liable for damages for such delays, unless the Services to be performed were obtainable on comparable terms from other sources in sufficient time to permit Vendor to meet its required performance schedule.
- 69.4. Neither party shall be liable for personal injury to the other party or damage to the other party's property except personal injury or damage to property proximately caused by such party's respective fault or negligence.

## 70. Savings

- 70.1. In the event funding from state, federal, or other sources is withdrawn, reduced or limited in any way after the effective date of this Contract and prior to normal completion, the Purchaser may terminate this Contract under the **TERMINATION** clause.

## Contract Termination

### 71. Termination for Default

- 71.1. If either Purchaser or Vendor violates any material term or condition of this Contract or fails to fulfill in a timely and proper manner its obligations under this Contract, then the aggrieved party shall give the other party written notice of such failure or violation. The responsible party will correct the violation or failure within thirty (30) calendar days or as otherwise mutually agreed in writing. If the failure or violation is not corrected, this Contract may be terminated immediately by written notice from the aggrieved party to the other party. The option to terminate shall be at the sole discretion of the aggrieved party. Purchaser reserves the right to suspend all or part of the Contract, withhold further payments, or prohibit Vendor from incurring additional obligations of funds during investigation of any alleged Vendor compliance breach and pending corrective action by Vendor or a decision by Purchaser to terminate the Contract.
- 71.2. In the event of termination of this Contract by Purchaser, Purchaser shall have the right to procure the Products and Services that are the subject of this Contract on the open market and Vendor shall be liable for all damages, including, but not limited to: (i) the cost difference between the original Contract price for the Products and Services and the replacement costs of such Products and Services acquired from another Vendor; (ii) if applicable, all administrative costs directly related to the replacement of this Contract, such as costs of competitive bidding, mailing, advertising, applicable fees, charges or penalties, staff time costs; and, (iii) any other costs to Purchaser resulting from Vendor's breach. Purchaser shall have the right to deduct from any monies due to Vendor, or that thereafter become due, an amount for damages that Vendor will owe Purchaser for Vendor's default.
- 71.3. If the Failure to Perform is without the defaulting party's control, fault, or negligence, the termination shall be deemed to be a **Termination for Convenience**.
- 71.4. This section shall not apply to any failure(s) to perform that results from the willful or negligent acts or omissions of the aggrieved party.

### 72. Termination for Convenience

When it is in the best interest of Purchaser, Purchaser Contracting Officer may terminate this Contract, in whole or in part, by thirty (30) calendar day's written notice to Vendor. If this Contract is so terminated, Purchaser is liable only for payments required by the terms of this Contract for Software and Services received and Accepted by Purchaser prior to the effective date of termination.

### 73. Termination for Withdrawal of Authority

In the event that Purchaser's authority to perform any of its duties is withdrawn, reduced, or limited in any way after the commencement of this Contract and prior to normal completion, Purchaser may terminate this Contract by seven (7) calendar days written notice to Vendor. No penalty shall accrue to Purchaser in the event this section shall be exercised. This section shall not be construed to permit Purchaser to terminate this Contract in order to acquire similar Services from a third party.

### 74. Termination for Non-Allocation of Funds

If funds are not allocated to Purchaser to continue this Contract in any future period, Purchaser may terminate this Contract by seven (7) calendar days written notice to Vendor or work with Vendor to arrive at a mutually acceptable resolution of the situation. Purchaser will not be obligated to pay any further charges for Services including the net remainder of agreed to consecutive periodic payments remaining unpaid beyond the end of the then-current period. Purchaser agrees to notify Vendor in writing of such non-allocation at the earliest possible time. No penalty shall accrue to Purchaser in the event this section shall be exercised. This section shall not be construed to permit Purchaser to terminate this Contract in order to acquire similar Services from a third party.

### 75. Termination for Conflict of Interest

Purchaser may terminate this Contract by written notice to Vendor if Purchaser determines, after due notice and examination, that any party has violated chapter 42.52 RCW, Ethics in Public Service or any other laws regarding ethics in public acquisitions and procurement and performance of contracts. In the event this Contract is so terminated, Purchaser shall be entitled to pursue the same remedies against Vendor as it could pursue in the event Vendor breaches this Contract.

### 76. Termination Procedure

- 76.1. In addition to the procedures set forth below, if Purchaser terminates this Contract, Vendor shall follow any procedures Purchaser specifies in Purchaser's Notice of Termination.
- 76.2. Upon termination of this Contract, Purchaser, in addition to any other rights provided in this Contract, may require Vendor to deliver to Purchaser any property, Products, or Work Products specifically produced or acquired for the performance of such part of this Contract as has been terminated. The section titled **Treatment of Assets** shall apply in such property transfer.
- 76.3. Unless otherwise provided herein, Purchaser shall pay to Vendor the agreed-upon price, if separately stated, for the Products or Services received and Accepted by Purchaser, PROVIDED: That in no event shall Purchaser pay to Vendor an amount greater than Vendor would have been entitled to if this Contract had not been terminated. Failure to agree with such determination shall be a dispute within the meaning of the **Disputes** section of this Contract. Purchaser may withhold from any amounts due Vendor such sum as Purchaser determines to be necessary to protect Purchaser from potential loss or liability.
- 76.4. Vendor shall pay amounts due Purchaser as the result of termination within thirty (30) calendar days of notice of amounts due. If Vendor fails to make timely payment,



Purchaser may charge interest on the amounts due at one percent (1%) per month until paid in full.

**77. Covenant Against Contingent Fees**

- 77.1. Vendor warrants that no person or selling agency has been employed or retained to solicit or secure this Contract upon any agreement or understanding for a commission, percentage, brokerage, or contingent fee, *except* bona fide employees or a bona fide established commercial or selling agency of Vendor.
- 77.2. In the event Vendor breaches this section, Purchaser shall have the right to either annul this Contract without liability to Purchaser, or, in Purchaser's discretion, deduct from payments due to Vendor, or otherwise recover from Vendor, the full amount of such commission, percentage, brokerage, or contingent fee.

**Contract Execution**

**78. Authority to Bind**

The signatories to this Contract represent that they have the authority to bind their respective organizations to this Contract.

**79. Counterparts**

This Contract may be executed in counterparts or in duplicate originals. Each counterpart or each duplicate shall be deemed an original copy of this Contract signed by each party, for all purposes.

*In Witness Whereof*, the parties hereto, having read this Contract in its entirety, including all attachments, do agree in each and every particular and have thus set their hands hereunto.

**This Contract is effective this \_\_\_\_ day of \_\_\_\_\_, 2\_\_.**

State of Washington  
*[Purchaser]*

**Approved**  
*[Vendor]*

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print or Type Name                      Date

\_\_\_\_\_  
Print or Type Name                      Date

\_\_\_\_\_  
Title

\_\_\_\_\_  
Title

**Approved as to Form**

State of Washington  
Office of the Attorney General

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print or Type Name

Assistant Attorney General

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

**Vendor Information**

Vendor's UBI Number:

## **Schedule A Vendors Response**

## Schedule B — *SAMPLE ESCROW AGREEMENT*

# ESCROW AGREEMENT

This Software License Contract (hereinafter referred to as “Contract”) is entered into by and between the State of Washington, acting by and through *[Agency Name]*, an agency of Washington State government (hereinafter referred to as “Purchaser” or “*[Agency Name]*” or “*[Department/Commission/Board]*”) located at P.O. Box 4*[xxxx]*, Olympia, Washington, 98504-*[xxxx]* and *[Vendor’s Name]*, a *[corporation, sole proprietorship, partnership or other business form]* licensed under UBI number *[UBI number]* and FEIN *[FEIN # or SSN in lieu]* to conduct business in the State of Washington (hereinafter referred to as “Vendor”), located at *[list Vendor’s address here]* for the purpose of licensing *[list item(s) to be licensed]*.

This Escrow Contract (hereinafter referred to as “Escrow Contract”) is entered into by and between the State of Washington, acting by and through *[Agency Name]* an agency of Washington State government (hereinafter referred to as Purchaser or “*[Agency Name]*” or “*[Department/Commission/Board]*”), located at P.O. Box 4*[xxxx]*, Olympia, Washington, 98504-*[xxxx]* and *[Vendor’s Name]*, a *[corporation, sole proprietorship, partnership or other business form]* (hereinafter referred to as “Vendor”), located at *[list Vendor’s address here]*, and *[Escrow Agent’s Name]*, a *[corporation, sole proprietorship, partnership or other business form]* (hereinafter referred to as “Escrow Agent”), organized and existing under the laws of the State of *[Agent’s State of registration]*.

WHEREAS, the Vendor and the Purchaser have entered into a Software License Contract No. *[XXX-XXX-XXX]* to which this Schedule is appended hereto and made a part hereof, pursuant to which the Vendor has licensed to the Purchaser certain computer software product(s), including updates, improvements, and enhancements thereof from time to time developed by the Vendor, and such additional program changes as the Purchaser may order from the Vendor from time to time, all documentation therefore developed by the Vendor (hereinafter collectively referred to as the “Product”); and

WHEREAS, it is the policy of the Vendor not to disclose the Source Code(s) and related documentation (hereinafter collectively referred to as the “Source Code Escrow Package”) for the Product(s) to its customers except as provided in an applicable Escrow Contract; and

WHEREAS Vendor and the Purchaser agree that upon occurrence of certain events described in Section 3(a) hereof, the Purchaser shall be able to obtain the Source Code Escrow Package and all revisions thereof;

ACCORDINGLY, the Vendor agrees to deliver the Source Code Escrow Package to the Escrow Agent upon the effective date of this Escrow Contract, which shall be as soon as practicable after the effective date of the Software License Contract between Vendor and the Purchaser.

NOW THEREFORE, in consideration of the mutual covenants exchanged herein and for other valuable consideration, the adequacy and receipt of which are hereby acknowledged, the Vendor, the Purchaser and the Escrow Agent hereby act and agree as follows:

## 1. DEPOSITS

The Escrow Agent, as a safekeeping (escrow) agent, agrees to accept from the Vendor the Source Code Escrow Package. "Source Code Escrow Package" shall mean the following:

- (a) A complete copy in machine-readable form of the Source Code and Executable Code of the Licensed Software;
- (b) A complete copy of any existing Design Documentation and User Documentation;
- (c) Complete instructions for compiling and linking every part of the Source Code into Executable Code for purposes of enabling verification of the completeness of the Source Code as provided below. Such instructions shall include precise identification of all compilers, library packages, and linkers used to generate Executable Code.

The Escrow Agent will issue to the Vendor and Purchaser a receipt for the Source Code Escrow Package upon delivery. The Source Code Escrow Package held by the Escrow Agent shall remain the exclusive property of the Vendor, and the Escrow Agent shall not use the Source Code Escrow Package or disclose the same to any third party except as specifically provided for herein. The Escrow Agent will hold the Source Code Escrow Package in safekeeping at its office listed in Section 9 titled Notices below unless and until the Escrow Agent is to deliver the Source Code Escrow Package to Vendor or the Purchaser, in which case, the Escrow Agent shall deliver the Source Code Escrow Package to the party identified therein, subject, however, to the sections of this Escrow Contract.

## 2. REPRESENTATIONS OF VENDOR TO PURCHASER

Vendor represents and warrants to Purchaser that:

- a. The materials described in the Contract as software applications products hereto constitutes the Source Code Escrow Package and documentation for the Product licensed to the Purchaser pursuant to the software license and service Contract therein.
- b. The Source Code Escrow Package delivered to the Escrow Agent are in a form suitable for reproduction by computer and photocopy Hardware, and consists of full source language statement of the program or programs comprising the Product and complete program maintenance documentation, including all flow charts, schematics and annotations which comprise the preceding detailed design specifications, and all other material necessary to allow a reasonably skilled third party programmer or analyst to maintain or enhance the Product without the help of any other person or reference to any other material; such Source Code Escrow Package to be in the mode machine readable by the then operating Purchaser Hardware and produced and copied on 1600 bpi magnetic tape.
- c. The Vendor will promptly supplement the source Code delivered hereunder with all revisions, corrections, enhancements or other changes so that the Source Code Escrow Package constitutes a human readable program for the current release of the Product. This supplementation shall be made in machine readable format by the then operating Purchaser Hardware and produced and copied on 1600 bpi magnetic tape, along with specifications of sections a. and b. herein, every six (6) months or within ten (10) days of delivery of any modification, enhancement, or upgrade to the Purchaser or any other customer of the Vendor, whichever occurs first.

## 3. NOTICE OF DEFAULT

- a. The Vendor shall be deemed to be in default of its responsibilities to the Purchaser if:
  - i. The Vendor becomes insolvent, makes a general assignment for the benefit of creditors, files a voluntary petition of bankruptcy, suffers or permits the appointment of a receiver for its business or assets, becomes subject to any proceeding under any bankruptcy or insolvency law, whether domestic or foreign;

- ii. The Vendor has wound up or liquidated its business voluntarily or otherwise and the Purchaser has compelling reasons to believe that such events will cause the Vendor to fail to meet its warranties and maintenance obligations in the foreseeable future; or
- iii. The Vendor voluntarily or otherwise discontinues support of the provided products or fails to support the products in accordance with its warranties and maintenance obligations.

The Purchaser shall give written notice ("Notice Of Default") to the Escrow Agent of any default by the Vendor. The Notice of Default shall, at the minimum:

- i. Be labeled "Notice of Default";
  - ii. Identify the Software License Contracts and any other relevant agreement, contained therein and this Escrow Contract;
  - iii. Specify the nature of the default(s);
  - iv. Identify the Source Code Escrow Package with specificity; and
  - v. Demand the delivery of the Source Code Escrow Package to the Purchaser.
- b. Upon receipt of the Notice of Default, the Escrow Agent shall send a copy thereof to the Vendor by certified or registered mail, postage prepaid, return receipt requested. The Escrow Agent shall the automatically be authorized and directed to deliver the Source Code Escrow Package to the Purchaser in accordance with this Escrow Contract within ten (10) days.

#### 4. NOTICE OF TERMINATION

Upon the termination of the applicable Software License Contracts, the Vendor may obtain the return of the applicable Source Code Escrow Package to terminated software applications products by furnishing written notice of the termination, agreed to by authorized and notarized signature of the Purchaser.

#### 5. DISPUTES

Escrow Agent shall not release the Source Code Escrow Package to either party except in accordance with the completion of any the sections in Section 3, or receipt of an agreement with authorized and notarized signatures of both Vendor and the Purchaser, authorizing the release of the Source Code Escrow Package to one of the parties hereto.

#### 6. PAYMENT OF ESCROW

As payment for its services hereunder, the Escrow Agent shall receive a fee of \_\_\_\_\_ from the Vendor.

#### 7. TERMINATION

Unless terminated sooner, this Escrow Contract shall terminate on the delivery of the Source Code Escrow Package of software applications products to Vendor or Purchaser as provided herein.

#### 8. WAIVER, AMENDMENT OR MODIFICATION; SEVERABILITY

This Escrow Contract shall not be waived, amended, or modified except by the written agreement of all the parties hereto. Any invalidity, in whole or in part, of any section of this Escrow Contract shall not affect the validity of any other of its sections.

#### 9. NOTICES

All notices required to be given hereunder shall be in writing and shall be given by certified or registered mail, return receipt requested, to the parties at their respective addresses as follows:

to **Vendor** at: *[Vendor Name]*  
 Attention: *[Name]*  
*[Street Address]*  
*[City]*  
*[State]*



to **Purchaser** at: State of Washington  
*[Agency]*  
 Attention: *[Contract Administrator/Officer, per agency policy]*  
*[Agency Address]*  
 Olympia, WA 98504-*[XXXX]*

to **Escrow Agent** at: *[Escrow Agent's Name]*  
 Attention: *[Name]*  
*[Street Address]*  
*[City]*  
*[State]*

#### 10. **LIMITATION ON ESCROW AGENT'S RESPONSIBILITY AND LIABILITY**

- a. The Escrow Agent shall not be obligated or required to examine or inspect the Source Code Escrow Package, or any of the Additions. The Escrow Agent's obligation for safekeeping shall be limited to providing the same degree of care for the Source Code Escrow Package as it maintains for its valuable documents and those of its customers lodged in the same location with appropriate atmospheric or other safeguards. However, the parties agree and acknowledge that the Escrow Agent shall not be responsible for any loss or damage to any of the Source Code Escrow Package due to changes in such atmospheric conditions, unless such changes are proximately caused by the gross negligence or malfeasance of the Escrow Agent.
- b. The Escrow Agent shall be protected in acting upon any written notice, request, waiver, consent, receipt or other paper or document furnished to it, not only in assuming its due execution but also the validity and effectiveness of its information therein contained, which it in good faith believes to be genuine and what it purports to be.
- c. In no event shall the Escrow Agent be liable for any act or failure to act under the sections of the Escrow Contract except where its acts are the result of gross negligence or malfeasance. The Escrow Agent shall have no duties except those which are expressly set forth herein, and it shall not be bound by any notice of a claim, or demand, termination or rescission of the Escrow Contract, unless in writing received by it, and, if its duties herein are affected, unless it shall have given its prior written consent thereto.
- d. To the extent permitted by law the parties to this Contract hereby indemnify the Escrow Agent against any loss, liability or damage (other than any caused by the gross negligence or malfeasance of the Escrow Agent), including reasonable costs of litigation and counsel fees, arising from and in connection with the performance of its duties under this Contract.

#### 11. **GOVERNING LAWS**

This Contract shall be governed in all respects by the law and statutes of the State of Washington. The venue of any action hereunder shall in the Superior Court for Thurston County, Washington.

#### 12. **AUTHORITY TO BIND**

The signatories to this Contract represent that they have the authority to bind their respective organizations to this Contract.

IN WITNESS WHEREOF, the parties hereto have caused this Escrow Contract to be duly executed in triplicate originals and each triplicate shall be deemed an original copy of the Contract signed by each party, for all purposes, as of the year and date last written below.

*[Agency Name]*

*[Vendor's Name]*

By: \_\_\_\_\_

By: \_\_\_\_\_

Its: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

ESCROW AGENT

By: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_